88- 17

No. _____

Supreme Court, U.S.
FILED
MAY 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

JESSE POSEY, SR., ET AL.,
*Petitioners,*

v.

STATE OF OHIO,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

JOHN A. CONNER, II
218 East State Street
Columbus, OH 43215-4360
(614) 221-5151
Counsel of Record
For Petitioners

MIDWEST LAW PRINTERS & PUBLISHERS, Grove City, Ohio 43123

## QUESTIONS PRESENTED

1. Does a fraternal organization knowingly and voluntarily consent to a search of its premises where a deputy sheriff gains entry into the premises under the auspices of being a social guest of a member of that organization, which member had reciprocal privileges with the fraternal organization in question?

2. Does a statute which imposes criminal sanctions against one subclass of charitable organizations while contemporaneously exempting from such sanctions another deny equal protection of the laws to the prosecuted subclass?

## LIST OF PARTIES

The parties to the proceeding below were the Petitioners Jesse Posey, Sr. and Sharon Parker, who are employees of the Petitioner, Fraternal Order of Eagles Post 3261. The Petitioner Fraternal Order of Eagles Post 3261 is an affiliate member of the international Fraternal Order of Eagles.

The Respondent is the State of Ohio.

TABLE OF CONTENTS

*Page*

QUESTIONS PRESENTED ..... i

LIST OF PARTIES ..... ii

OPINIONS BELOW ..... 1

JURISDICTION ..... 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... 3

STATEMENT OF THE CASE AND FACTS ..... 4

REASONS FOR GRANTING THE WRIT ..... 6

I. The decision of the Ohio Supreme Court applying the consent exception for validating warrantless searches is beyond the limits prescribed by this Court and is in conflict with the prior decision of this Court and other State and Federal Courts' decisions ..... 6

II. Statutes may not arbitrarily discriminate between subclasses of charitable organizations where such discrimination bears no rational nexus to the expressed governmental objective ..... 8

CONCLUSION ..... 20

CERTIFICATE OF SERVICE ..... 21

*Page*

APPENDICES:


Opinion of Supreme Court of Ohio ..... A-1

Opinion of Court of Appeals ..... A-24

United States Cinstitution
Fourth Amendment ..... A-32

United States Constitution
Fourteenth Amendent ..... A-32

26 U.S.C. § 170 ..... A-32

26 U.S.C. § § 501 (a), 501 (c) (3), &
501 (c) (8) ..... A-33

28 U.S.C. § 1257 (a) ..... A-34

Ohio Revised Code § 2915.01
and 2915.02 ..... A-35

TABLE OF AUTHORITIES

*Page*

Cases:

*Bumper v. N. Carolina*, 391 U.S. 543, (1968) ..... 6

*California v. Cirado*, 476, U.S. 207, (1968) ..... 10

*Coolidge v. New Hampshire*, 403 U.S. 443, (1971).... 11

*Fraternal Order of Eagles v. United States*, 57 F. 2d 93 (C.A. 9, 1932) ..... 7

*Gouled v. United States*, 255 U.S. 298, (1921) ..... 6

*Guirdry v. State*, 671 P. 2d 1277 (1983) ..... 8

*Kadrmas v. Dickinson Pub. Schools*, 487 U.S. ___ , 198 S.Ct. 2481, 101 L Ed 2d 399, (1988) ..... 14

*Katz v. United States*, 369 U.S. 347, (1967) ..... 6

*Lewis v. United States*, 385 U.S. 206 (1966) ..... 9, 10

*Mills-Jennings of Ohio, Inc. v. Dept. of Liquor Control*, 70 Ohio St. 2d 95, 435 NE 2d 407 (1982)..... 18

*Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) ..... 6

*State v. Pi Kappa Alpha Fraternity*, 23 Ohio St. 3d 141, 492 NE 2d 1129 (1980)..... 8

*State v. Posey, et al.*, 40 Ohio St. 3d 420, 534 NE 2d 61 (1988)..... 10, 15, 17

*State v. Wyand*, 305 Md 721, 501 A 2d 43 (1985)..... 18

*United States v. Baldwin*, 621 F. 2d 251 Reh Den 632 F. 2d 1 Cert den. 450 U.S. 1043 (C.A. 6, 1980) ..... 7

*United States v. Miglietta*, 507 F. Supp 353 (MD Fla 1980) ..... 8

Page

*Warden v. Hayden*, 387 U.S. 294 (1967) ..... 7

Constitutional provisions:

United States Constitution
Fourth Amendment ..... 6, 7, 8, 9

United States Constitution
Fourteenth Amendment ..... 6, 19

Federal Statutes:

26 U.S.C. § 501 (a) ..... 12, 13, 14

26 U.S.C. § 501 (c) (3) ..... 12, 13, 14, 15, 16, 17

26 U.S.C. § 501 (c) (8) ..... 13, 14, 16, 17, 18

26 U.S.C. § 509 (a) (1) ..... 13, 15

26 U.S.C. § 509 (a) (2) ..... 13, 15

26 U.S.C. § 509 (a) (3) ..... 13, 15

Ohio Statutes:

Ohio Revised Code § 2915.01 (H) ..... 13

Ohio Revised Code § 2915.01 (M) ..... 13

Ohio Revised Code § 2915.01 (Z) ..... 17

Ohio Revised Code § 2915.02 ..... 16

Ohio Revised Code §2915.02 (A) ..... 12

Ohio Revised Code § 2915.02 (D) (1) ..... 12, 15

Ohio Revised Code § 2915.02 (D) (2) ..... 13

Ohio Revised Code § 2915.07 ..... 16

Ohio Revised Code § 2915.09 (A) ..... 16

Committee Comment to Ohio Revised
Code § 2915.02 ..... 16, 17

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners rely on the following constitutional and statutory provisions, the verbatim text of which is set forth in the appendix beginning at p. A-32, *infra.*

United States Constitution, Fourth Amendment, Fourteenth Amendment, § 1.

28 USC § 1257 (a).

26 U.S.C. § § 170.501 (a), 501 (c) (3), and 501 (c) (8).

Ohio Revised Code § § 2915.01, 2915.02.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1988

---

*JESSE POSEY, ET AL., Petitioners,*

v.

*STATE OF OHIO, Respondent.*

---

# PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

---

The Petitioners, Jesse Posey, Sr., Sharon Parker and Fraternal Order of Eagles Post 3261 respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Ohio Supreme Court entered in the above entitled proceeding on January 30, 1989.

## OPINIONS BELOW

The opinion of the Ohio Supreme Court rendered in this cause is reported at 40 Ohio St. 3d 420, 534 NE 2d 61 (1988) and is reprinted in the appendix hereto, p. A-1, *infra.* The opinion of the Court of Appeals of Ohio, Tenth Appellate District has not been reported and is reprinted in the appendix hereto, p. A-24, *infra.*

There was no written opinion of the trial court. Its content is described in the opinion of the Court of Appeals which is set forth in the Appendix p., A-24, *infra.*

## JURISDICTION

Petitioners seek a writ of certiorari from this Court pursuant to the authority conferred upon it by 28 USC § 1257 (a) to review the decision of the Ohio Supreme Court which upheld the provisions of Ohio Revised Code § 2915.02 over Petitioners' challenge that said statute violated their rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Petitioners further seek a review of the Ohio Supreme Court's decision and the decisions of the lower courts which found the search and seizure conducted in this cause to be valid where Petitioners challenge that search and seizure as violating their rights under the Fourth Amendment to the United States Constitution which is applicable to the states by virtue of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The decision of the Ohio Supreme Court was entered on January 30, 1989 and no rehearing was requested or ordered.

This petition is being filed outside the time limits prescribed by Rule 20.1 of this Court. Petitioners respectfully request that this Court waive that restriction. This is a criminal case and at least one of the issues raised would have given rise to the exercise of the former appellate jurisdiction of the Court. (Former 28 U.S.C. 1257 (2)) Petitioners discovered the amendments to 28 U.S.C. 1257 at a time beyond the sixty day limit of Rule 20 and beyond the time available to seek an extension of time to file set out in said rule. Petitioners thus respectfully request leave to file this petition *Instanter.*

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners rely on the following constitutional and statutory provisions, the verbatim text of which is set forth in the appendix beginning at p. A-32, *infra.*

United States Constitution, Fourth Amendment, Fourteenth Amendment, § 1.

28 USC § 1257 (a).

26 U.S.C. § § 170.501 (a), 501 (c) (3), and 501 (c) (8).

Ohio Revised Code § § 2915.01, 2915.02.

## STATEMENT OF THE CASE AND FACTS

Franklin County, Ohio, Sheriff's Deputy, Ernest Cook, received information from an informant who had provided him with reliable information in the past that gambling activities were taking place at the Fraternal Order of Eagles Post 3261 (FOE) located in Reynoldsburg, Ohio. The informant was a member of the FOE although not of this particular post. On or about May 7, 1986 Deputy Cook accompanied by the informant went to the premises of the FOE. The informant rang the buzzer at the door of the club and the door was opened. The informant had identification of membership in her hand and presented them to the doorkeeper though the doorkeeper did not ask to see them. The informant was permitted to enter the premises and Cook was allowed to accompany her under the auspices of being her guest. Once inside Cook and the informant ordered drinks and made observations of alleged gambling activities. These activities included the use of Draw Poker machines and instant win tickets. Deputy Cook himself engaged in these activities.

Thereafter as a result of what Cook and the informant saw on the premises of the FOE, Cook abtained a warrant to search the premises on May 9, 1986. A search of the premises subsequently was conducted. Thereafter Petitioners, FOE, Jesse Posey, Sr., and Sharon Parker, were charged with violating Ohio Revised Code § 2915.02 for the activities observed on May 7, 1986.

Petitioners each filed motions to suppress the evidence within the time prescribed by Ohio Crm. R. 12 (C) (3). Also each Petitioner filed a motion requesting a dismissal of the charges on both statutory and constitutional grounds.

The trial court overruled Petitioners' motions to suppress finding that Cook and the informant's entry into

the premises was lawful and anything observed thereafter in plain view was admissible. The trial court did, however, sustain Petitioners' motions to dismiss because the Respondent could not demonstrate that the gambling that was going on was for profit and that the statutes exempting from prosecution certain charitable organizations but not the FOE denied the FOE equal protection of the laws pursuant to the Fourteenth Amendment to the United States Constitution.

Both Petitioners and Respondent appealed the trial court's decision to the Court of Appeals of Ohio, Tenth Appellate District, which affirmed the trial court's decision overruling the motion to suppress but reversed the trial court's dismissal. Petitioners filed a motion to certify the record with the Ohio Supreme Court which was granted.

Thereafter, reviewing the matter on the merits, the Ohio Supreme Court determined that Ohio Revised Code § 2915.02 (D) did not deny equal protection of the laws to Petitioner, FOE, by exempting from the operation of Ohio Revised Code § 2915.02, organizations described in subsection 501 (c) (3) of the Internal Revenue Code and not organizations described in section 501 (c) (8) thereof.

The Court also determined that when an individual gives consent to another to enter a private area wherein illegal activities are being conducted the consent does not lose its status of being freely and voluntarily given because it would not have been given but for the fact that the other person failed to identify himself as a police officer or agent.

Petitioners now seek a writ of certiorari from this Court because the validity of a state statute has been called into question as being repugnant to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and because of a violation of

rights claimed specifically under the Fourth and Fourteenth Amendments to the United States Constitution. (28 USC § 1257 (a))

## REASONS FOR GRANTING THE WRIT

### I.

### THE DECISION OF THE OHIO SUPREME COURT APPLYING THE CONSENT EXCEPTION FOR VALIDATING WARRANTLESS SEARCHES IS BEYOND THE LIMITS PRESCRIBED BY THIS COURT AND IS IN CONFLICT WITH THE PRIOR DECISION OF THIS COURT AND OTHER STATE AND FEDERAL COURTS' DECISIONS.

This Court has repeatedly emphasized that the mandate of the Fourth Amendment made applicable to the states by the Fourteenth Amendment requires adherence to judicial processes and that searches conducted outside the judicial process without prior approval by a judge or magistrate are *per se* unreasonable subject to a few specifically established and well-delineated exceptions. *Katz v. United States*, 369 U.S. 347, 356 (1967); see also, *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). One of these recognized exceptions is consent to search. However, the state has the burden of proving that consent was freely and voluntarily given. *Bumper v. N. Carolina*, 391 U.S. 543, 548, 549 (1968). Mere acquiesence is not sufficient to establish consent. *Bumper, supra.* Moreover where admittance is gained through stealth or social acquaintance or in the guise of a business call such entries fall within the prohibition of the Fourth Amendment. *Gouled v. United States*, 255 U.S. 298, 305-306 (1921)[1]

As is evident from the decision of the Ohio Supreme

Court in this case[2], there is a divergence of opinion in both federal and state courts where government officials gain entry onto private property by deception as to the agents identity or purpose. In *Fraternal order of Eagles v. United States*, 57 F. 2d 93 (C.A. 9, 1932) a search by government agents was held violative of the Fourth Amendment where government agents obtained admission to a private club suspected of selling intoxicating liquor illegally. The agents represented that they were members of a distant lodge of the same order when in truth they were not. The government officials produced identification which had surreptitiously been taken from another lodge. The court acknowleged a duty on behalf of courts to be watchful over stealthy encroachment against the constitutional rights of citizens. Relying on several cases decided by this Court, that court stated:

> "A search made as a result of an entry by physical force is not necessary in order to violate the Fourth Amendment. That amendment was designed to protect the individual against the abuse of official authority. A search and seizure following an entry into the home or office of a person suspected of crime by means of fraud, stealth, social acquaintance or under the guise of a business call are unreasonable and violate the Fourth Amendment." (57 F. 2d at 94)

However, in *United States v. Baldwin*, 621 F. 2d 251 Reh Den 632 F. 2d 1 Cert den. 450 U.S. 1043 (C.A. 6, 1980) the court upheld a search and seizure where the government agent accepted employment with the defen-

---

[1] Disapproved on other grounds, *Warden v. Hayden*, 387 U.S. 294 (1967)

[2] Three out of seven judges joined in the dissent on this issue.

dant as his general handyman and chauffer. Also in *United States v. Miglietta*, 507 F. Supp. 353 (MD Fla 1980) the court upheld a search by government agents disguised as delivery personnel. A search warrant was subsequently obtained based in part on evidence seen during the ruse entries.

The Alaska Supreme Court in *Guirdry v. State*, 671 P. 2d 1277 (1983) upheld a search made by government agents on the basis that the defendant consented to the search. The agents led the defendant to believe that they were interested in real estate which was adjacent to the defendant's and approached him for information. The defendant suggested that his wife might know more about it and invited them into his home where they saw evidence tending to incriminate the defendant.

In *State v. Pi Kappa Alpha Fraternity*, 23 Ohio St. 3d 141, 492 NE 2d 1129 (1980) the court found that a search conducted by liquor agents posing as alumni of the fraternity in Georgia to gain admittance violated the fraternity's Fourth Amendment rights. The agents told the fraternity manager that they wanted to look around the fraternity house because a brother of one of the agents was interested in attending that university and joining that fraternity. During the inspection the agents saw a "Coke" machine which contained beer. The agents asked and were granted permission to purchase a beer from the machine. The fraternity did not have a license to sell alcoholic beverages and was subsequently charged criminally for engaging in unlicensed liquor sales. The court reasoned that the agents were not admitted to the premises for the purpose of engaging in illegal activity nor was the fraternity house seen as a commercial center of criminal activity and thus the liquor agents were not privileged to use deception to gain entry.

Perhaps some of the confusion in the authorities can

be traced to a misapplication of this Court's holding in *Lewis v. United States*, 385 U.S. 206 (1966). In *Lewis* an undercover narcotics officer twice entered the defendant's home without a warrant and removed marijuana therefrom which he purchased. It is important to note however that although the government agent's identity was misrepresented, his purpose for the entry was not. Moreover, he entered the premises on each occasion only after he was invited to do so. Once there the undercover agent did not hear or take anything that was not specifically intended by the defendant. One's home is accorded the full range of Fourth Amendment protection.

> "... [b]ut when, as here, the home is converted into a commercial center to which outsiders are invited *for purposes of transacting unlawful business*, that business is entitled to no greater sanction than if it were carried on in a store, a garage, a car, or on the street ..." (emphasis added) (*Lewis, supra*, at 211)

A government agent, like a private person, noted the Court, may accept an invitation to do business and may enter premises for the very purposes contemplated by the occupant. (*Lewis, supra*, at 211)

The case at hand presents facts significantly different than those in *Lewis, supra*. The sheriff's deputy met with a confidential informant about one hour before conducting his search. She advised him that the FOE was engaging in illegal activity. The informant was a member of the FOE but not this Aerie. The informant and the deputy appeared at the door to the club and the informant rang the buzzer. Someone inside opened the door and said come on in. The informant displayed her membership credentials to the doorperson and she and Deputy Cook, posing as her guest, entered the club. They remained there for several hours and made the observations which led to the filing of the present case.

The majority of the Court below found *Lewis, supra*, controlling after finding that the sheriff's deputy was:

> "...clearly invited into the club for the purpose of observing and engaging in the club's activities including its gambling activities ..." (*Posey, supra*, 40 Ohio St. 3d at 429, 534 NE 2d at 68)

The majority further held that the FOE had no reasonable expectation of privacy, *California v. Cirado*, 476 U.S. 207, 211 (1986) because Cook entered the post as a guest of a member. Thus the court concluded that the FOE had consented to the search by Deputy Cook and no warrant was required.

As the dissenting judges recognized, if anything can be assumed from the interchange between the deputy, his companion and the doorkeeper it is that entry was gained as a result of the presentation of membership credentials. Such deception negates any notion that consent was freely and voluntarily given. Based on the majority's logic, the dissent argues, there is nothing to preclude law enforcement officials for obtaining credentials to any private club and thereafter search them at will under the guise of consent.

Clearly Deputy Cook's ruse of posing as a social guest of a member of the FOE having reciprocal privileges with Petitioner, FOE, cannot be characterized as consent where no invitation to engage in illegal activity was extended. The informant took Cook to the club for the sole purpose of obtaining evidence. As to the club and its other members, Deputy Cook practiced deception as to both his identity and purpose.

Cook utilized the informant as his agent to gain admittance. Their sole intent was to search for evidence of a crime. What then is the difference between these facts and the situation where an agent uses false credentials?

His fraud vitiates any claim of consent, freely and voluntarily given.

Deputy Cook had no need to enter these premises without a warrant. He simply chose not to try and obtain one. He had ample opportunity to do so assuming probably cause could be established.

The FOE's reasonable expectations of privacy are readily apparent. The FOE is a private club open only to members and presumably guests[3] of members. When Deputy Cook and the informant reached the door to the club they found it was locked. Cook allowed the informant to enter first knowing she had the proper credentials to gain entry. Without those credentials he expected his entry to be challenged.

In his testimony, Cook tries to emphasize the fact that the doorkeeper did not specifically request the informant's membership credentials. The majority of the lower courts also rely heavily on this testimony. This point ignores the fact that the credentials were displayed making a request to see them unnecessary. If they were ignored, however, such fact demonstrates nothing more than acquiescence to the entry. As the cases cited above show, acquiescence is insufficient to establish consent for a warrantless search.

If the Court grants *certiorari* and sustains Petitioners' position then the evidence obtained by Deputy Cook's observation must be excluded. The "Plain View" exception to the requirement of a warrant would have no application under these facts.

*Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971)

---

[3] The record is silent as to the right of non-members to enter as guests to the FOE. Deputy Cook merely claimed to be posing as a guest of a member which presumably, if true, would allow him to enter the club.

II

STATUTES MAY NOT ARBITRARILY DISCRIMINATE BETWEEN SUBCLASSES OF CHARITABLE ORGANIZATIONS WHERE SUCH DISCRIMINATION BEARS NO RATIONAL NEXUS TO THE EXPRESSED GOVERNMENTAL OBJECTIVE.

Petitioners were charged with violating Ohio Revised Code § 2915.02 (A) which states:

"No person shall:

... ... ...

(2) Establish, promote, or operate, or knowingly engage in conduct that facilitates any scheme or game of chance conducted for profit;

... ... ...

(5) With purpose to violate division (A) (1), (2), (3), or (4), of this section, acquire, possess, control, or operate any gambling device."

However, Ohio Revised Code § 2915.02 (D) (1) provides for certain exemptions from the foregoing statute. It states:

"This section does not apply to:

(1) Schemes of chance conducted by a charitable organization that is, and has received from the Internal Revenue service a determination letter that is currently in effect, stating that the organization is, exempt from federal income taxation under section 501 (a) and described in subsection 501 (c) (3) of the Internal Revenue Code, provided that all of the money or assets received from such schemes of chance after deduction only of prizes paid out during the conduct of the scheme of chance are used by, or give, donated, or otherwise transferred to any

organization that is described in subsection 509 (a) (1), 509 (a) (2), or 509 (a) (3) of the Internal Revenue Code and is either a governmental unit or an organization that is tax exempt under subsection 501 (a) and described in subsection 501 (c) (3) of the Internal Revenue Code, and provided that the scheme of chance is not conducted during or within ten hours of a bingo game conducted for amusement purposes only pursuant to section 2915.02 of the Revised Code."

Subsection (D) (2) of Ohio Revised Code § 2915.02 (D) (2) goes on to provide further exclusions as follows:

"This section does not apply to:

... ... ...

(2) Games of chance if all of the following apply:

... ... ...

(b) The games are conducted by a charitable organization that is, and has received from the Internal Revenue Service, a determination letter that is currently in effect, stating that the organization is, exempt from federal income taxation under section 501 (a) and described in subsection 501 (c) (3) of the Internal Revenue Code."

Petitioner, FOE, is both a charitable organization[4] and a fraternal organization[5] under Ohio law and is exempt from federal income taxation under the provisions of § 501 (c) (8) of the Internal Revenue Code. Petitioner, FOE, does not, however, fall within the classifications described in subsection 501 (c) (3) of the Internal Revenue Code. By virtue of this fact alone it is denied the benefit of the exemptions described above

[4] Ohio Revised Code § 2915.01 (H)

[5] Ohio Revised Code § 2915.01 (M)

which would enable it to engage in fundraising activities to benefit its charitable causes and subjects it to the imposition of criminal sanctions for engaging in such conduct.

In upholding the statute in question against the Petitioners equal protection attack, the Court below quoted with approval the following language from *Kadrmas v. Dickinson Pub. Schools*, 487 U.S. ___ , ___ , 108 S.Ct. 2481, 2487, 101 L Ed 2d 399, 409, (1988) wherein this Court stated:

> "Unless a statute provokes 'strict judicial scrutiny' because it interferes with a 'fundamental right', or discriminates against a 'suspect class' it will ordinarily survive an equal protection attack so long as the challenged classification is rationally related to a legitimate governmental purpose."

The lower court determined that subsections 501 (c) (3) and 501 (c) (8) described two completely different classes of organizations. The Court reasoned that subsection 501 (c) (3) institutions are organized and operated exclusively for religious, charitable, scientific, or like purposes. On the other hand, subsection 501 (c) (8) organizations are fraternal, beneficiary societies operated under the lodge system for the exclusive benefit of its members. The lower court believed that a major distinction existed between 501 (c) (3) and 501 (c) (8) organizations in that no part of the net earnings of a 501 (c) (3) organization may inure to the benefit of any private shareholder or individual. On the other hand noted the court, a 501 (c) (8) organization must provide life, sickness, accident or other benefits to its members. The court, therefore, appears to reason that since no part of the net earnings of a 501 (c) (3) organization may inure to the benefit of its individual members, such dis-

tinction was sufficient to establish a rational distinction between the two types of organizations that may engage in schemes or games of chance to promote their charitable purposes. This distinction, however, clearly fails to recognize another distinction in Ohio law which provides that all income received from the conduct of schemes of chance after deducting only prizes paid out during the conduct of the scheme of chance must be used by, or given, donated, or otherwise transferred to any organization that is described in subsection 509 (a) (1), 509 (a) (2), or 509 (a) (3) of the Internal Revenue Code and is either a governmental unit or an organization that is tax-exempt under subsection 501 (a) and described in subsection 501 (c) (3) of the Internal Revenue Code. (Ohio Revised code § 2915.02 (D) (1)). Thus the distinction drawn by the court failed to consider the purpose for which the legislature allowed certain charitable organizations to engage in schemes of chance. That purpose would be legally no different for petitioners than it would be for any religious, scientific, educational, or other charitable organization. Rather the General Assembly of the State of Ohio sought only to distinguish between the types of organizations that may engage in this sort of charitable fundraising activity. The statutes specifically state the purposes for which the net proceeds may be used. The Ohio Supreme Court seems to have missed this distinction when it found:

> "...[w]e find the choice to be supported by the legitimate state interest not to prohibit certain gambling activities, the proceeds of which are used exclusively for public and charitable purposes and do not inure to the benefit of individual members of the organization. ..." (40 Ohio St. 3d at 426, 534 NE 2d at 66)

However, the Court's stated reason is not supported by the statutes in question which specifically require that all funds derived from conducting games of chance be used by or donated or otherwise transferred to either governmental organizations or organizations that are described in subsection 501 (c) (3). Petitioner if otherwise allowed to conduct schemes of chance could not utilize any of the proceeds to provide life, sickness or accident insurance for its members.

The lower court's finding of a rational basis does not exist. The statute under attack merely discriminates arbitrarily between subclasses of the same type of organization that may lawfully engage in conducting schemes of chance. This distinction arbitrarily places Petitioner, FOE, at a disadvantage in charitable fundraising.

To further illustrate the lack of rationality of the statute under which Petitioner, FOE, was prosecuted it should be noted that Petitioner as a charitable organization is authorized to conduct charitable bingo games pursuant to the provisions of Ohio Revised Code § 2915.07, *et. seq.* That is, the Charitable Bingo Act set forth in those sections does not make any distinction between 501 (c) (3) and 501 (c) (8) organizations. Substantially identical restrictions apply with respect to the use of the proceeds of any such game.[6]

The Committee Comments to Ohio Revised Code § 2915.02 specifically declare that the provisions of the gambling laws of the State of Ohio are designed to suppress the business of gambling.[7] Thus the legislature of the State of Ohio has specifically declared the purposes

[6] Organizations that engage in charitable bingo must:

(2) Use all of the gross receipts from the bingo game for paying prizes, for the charitable purposes listed in its bingo license application ..." (Ohio Revised Code § 2915.09 (A))

for which it enacted its gambling laws. The decision of the Ohio Supreme Court in this cause goes beyond this declared legislative purpose by prohibiting charitable organizations such as the Petitioner from utilizing schemes of chance to benefit their charitable activities. There appears to be no legitimate governmental interest in allowing charitable organizations such as Petitioner to engage in charitable bingo and at the same time preclude it from engaging in other schemes or games of chance. This would seem particularly so when other charitable organizations may engage in such conduct to support their charitable activities. Both organizations must utilize the net proceeds of their gaming activities for charitable purposes and the net proceeds of such games may not legally inure to the benefit of any private individual or shareholder. Therefore, the rational relationship relied upon by the Ohio Supreme Court in upholding this statute is non-existent.

The Court goes on to note a further distinction between 501 (c) (3) and 501 (c) (8) organizations. It noted that contributions to 501 (c) (3) organizations were always deductible for tax purposes while contributions to 501 (c) (8) organizations are deductible only by individuals and only if they are to be used exclusively for charitable purposes. (40 Ohio St. 3d at 425, 534 NE 2d at 65-66) Although this distinction may be perfectly proper for tax purposes it has no relevance to the issue under discussion, since all net proceeds from conducting schemes of chance must be utilized for charitable pur-

---

See also, Ohio Revised Code § 2915.01 (Z) p. A-42, *infra*.

[7] Committee Comment to H-511 states in relevant part:

"This section is aimed at suppressing the business of gambling, and prohibits gambling for profit, as well as various peripheral activities which support it. It does not prohibit gambling (other than bookmaking) which is not conducted for profit."

poses. The distinction does, however, recognize that 501 (c) (8) organizations are engaged in charitable activities which entitle certain contributions made to them to be deducted for federal income tax purposes.

In recent times the public attitude as reflected in laws passed by the various general assemblies of the states and some municipalities have reflected a major trend away from the former prohibition against gaming. A substantial number of states as well as some municipalities are now engaged in the business of conducting lotteries. Other states, such as Ohio, now allow charitable organizations to engage in gaming activities as a means of raising funds to support their charitable activities. Even private gambling such as casino gaming in Atlantic City and Nevada, as well as horse races, dog races and wagering on jai lai are to one degree or the other accepted throughout the country. Formerly the states had a legitimate governmental interest in prohibiting gaming and gambling. However, that interest has now yielded to a policy of regulation versus prohibition. By virtue of this fact the interests of government have undergone significant changes which demonstrate major shifts in public policy. (See, e.g. *State v. Wyand*, 305 Md 721, 501 A 2d 43 (1985); *Mills-Jennings of Ohio, Inc. v. Dept. of Liquor Control*, 70 Ohio St. 2d 95, 435 NE 2d 407 (1982) As the interest of government change the application of constitutional guarantees must also change to meet new situations.

In the instant matter the legitimate governmental interest relied upon by the Ohio Supreme Court is non-existent in the statutory scheme selected by the Ohio General Assembly, nor does it accord with the expressed intent of the legislature. These gambling laws arbitrarily discriminate against members of the same class according substantial benefits to a portion of that class and provide criminal sanctions to another.

In light of the major changes throughout the country in this area it is unlikely to believe that such changes will not continue. It is thus imperative that this Court provide guidance to the various general assemblies throughout the country to help them promulgate legislation within the confines of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

## CONCLUSION

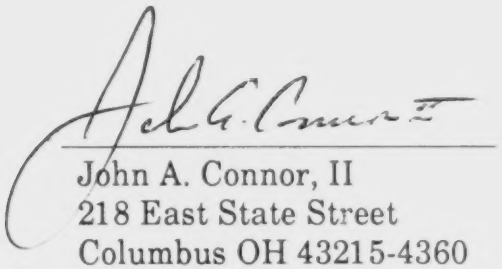
For the reasons set forth above, petitioners respectfully request that this Court issue a writ of certiorari to the Supreme Court of Ohio to review the issues set forth herein.

Respectfully submitted,

JOHN A. CONNOR, II
218 East State Street
Columbus OH 43215-4360
(614) 221-5151
Counsel for Petitioner

## CERTIFICATE OF SERVICE

I, John A. Connor, II, a member of the Bar of this Court, hereby certify that on this first day of May, 1989, three copies of the Petition for Writ of Certiorari in the above entitled case were mailed, first class postage prepaid, to Ronald C. O'Brien, City Attorney, 90 West Broad Street, 2nd Floor, Columbus, Ohio, 43215, counsel for the Respondent herein. I further certify that all parties required to be served have been served.



John A. Connor, II
218 East State Street
Columbus OH 43215-4360
(614) 221-5151
Counsel of Record
For Petitioners

# APPENDIX

**THE STATE OF OHIO ET AL.,**
*Appellees,*

*v.*

**POSEY ET AL.,**
*Appellants.*

[Cite as State *v.* Posey (1988), 40 Ohio St. 3d 420.]

*Criminal law — R.C. 2915.02 — Gambling — Nonprofit organization — Nonprofit organization may be convicted of gambling — Equal protection — Subsection 501(c)(8) organizations not denied equal protection by exemption granted by R.C. 2915.02(D) to subsection 501(c)(3) organizations — Search and seizure — Consent given to person, who is later identified as a police officer, to enter private area where illegal activities are being conducted is valid, when.*

O.Jur 3d Criminal Law § 2327.

1. A nonprofit organization may be convicted of gambling for profit under R.C. 2915.02.

2. R.C. 2915.02(D) does not deny equal protection of the laws by exempting from the operation of R.C. 2915.02 organizations described in subsection 501(c)(3) of the Internal Revenue Code and not organizations described in subsection 501(c)(8) thereof.

O.Jur 3d Criminal Law § 511.

3. When an individual gives consent to another to enter a private area wherein illegal activities are being conducted, the consent does not lose its status of being freely and voluntarily given merely because

it would not have been given but for the fact that the other person failed to identify himself as a police officer or agent.

(No. 87-1677 - Submitted September 21, 1988—Decided December 30, 1988.*)

APPEAL from the Court of Appeals for Franklin County, Nos. 86AP-1132, 86AP-1162 and 86AP-1163.

On May 7, 1986, Franklin County Deputy Sheriff Ernest Cook visited the premises of the Fraternal Order of Eagles ("FOE") Post 3261 in Reynoldsburg, Ohio. Prior to this visit Detective Cook had received information from an informant that gambling activities were being conducted at the Reynoldsburg Post. This informant was a member of the FOE. She had been a reliable source of information for Cook in the past, and on May 7, 1986, she accompanied Cook to the Reynoldsburg post.

The informant had her FOE credentials in hand and presented them to the doorkeeper, though the doorkeeper apparently never asked to see them. The informant was permitted to enter the premises, and Cook was allowed to accompany her as her guest. Once inside, Cook and the informant ordered drinks and observed the alleged gambling activity, which consisted of the use of electronic draw poker machines and instant win tickets. Cook himself engaged in these activities. As a result of his observations, Cook obtained a warrant to search the premises on May 9, 1986. A search pursuant to the warrant was conducted on that date.

---

* Reporter's Note: This cause was decided on December 30, 1988, but was released to the public on January 30, 1989, subsequent to the retirement of Justice Locher, who participated in the decision.

On June 2, 1986, appellants, Jesse Posey, Sr., Fraternal Order of Eagles Post 3261, and Sharon Parker, were charged with violating R.C. 2915.02. Appellants each filed a motion to suppress the evidence. Appellants also each filed a motion to dismiss the charges on statutory and constitutional grounds. The trial court overruled the motions to suppress on December 12, 1986, finding that Cook's entry into the lodge was lawful and that anything he observed in plain view was admissible. However, the court did grant appellants' motions to dismiss the charges on two grounds: that the state could not demonstrate that the gambling was for profit; and that the statute's exemption from prosecution of certain charitable organizations, but not the FOE, denied the FOE equal protection of the laws. Both decisions were appealed to the court of appeals, which on July 28, 1987, affirmed the denial of the motions to suppress, but reversed the dismissals and remanded the cases for trial.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

*Ronald J. O'Brien,* city attorney, *James J. Fais,* city prosecutor, and *Maria O. Juskiw,* for appellees state of Ohio and city of Columbus.

*John A. Connor II Co., L.P.A.,*and *John A. Connor II,* for appellants.

WRIGHT, J. Three questions are presented to us for review. The first is whether the FOE, a nonprofit fraternal organization, can ever be found to have engaged in gambling for profit in violation of R.C. 2915.02. The second is whether application of R.C. 2915.02 to the FOE is consistent with the equal protection guarantees of the United States and Ohio Constitutions in light of certain exemptions from prosecution granted to other

purely charitable institutions by division (D) of this code provision. The final question is whether the evidence seized by Detective Cook is admissible notwithstanding that the seizure, while made pursuant to a warrant, was preceded by an alleged deceptive warrantless entry into the premises. We answer all three questions in the affirmative, and accordingly we affirm the judgment of the court of appeals.

I

Appellants have been charged with violations of R.C. 2915.02(A), which states:

"No person shall:

"* * *

"(2) Establish, promote, or operate, or knowingly engage in conduct that facilitates any scheme or game of chance conducted for profit;

"* * *

"(5) With purpose to violate division (A)(1),(2),(3),or(4) of this section, acquire, possess, control, or operate any gambling device."

Appellants' first line of attack on the application of R.C. 2915.02 focuses on the term "for profit." Appellants contend that because the FOE is a "nonprofit" organization, the state cannot prove that the FOE's gambling activities were conducted "for profit." Thus, appellants argue that neither the FOE nor its agents may be prosecuted under R.C. 2915.02.

We agree with appellants that the state must prove that the gambling at issue was "for profit" before they can be convicted of violating R.C. 2915.02. *State* v. *Parker* (1948), 150 Ohio St. 22, 26, 37 O.O. 318, 320, 80 N.E. 2d 490, 492; *State* v. *Polozzi* (M.C. 1975), 44 Ohio Misc. 34, 38, 73 O.O. 2d 104, 106, 336 N.E. 2d 471, 474. We recognize that the FOE is a "charitable organization" as that term is defined in R.C. 2915.01(H),[1] and is

[1] The Fraternal Order of Eagles is a subsection 501(c)(8)

a "fraternal organization" under the definition of that term in R.C. 2915.01(M).[2] However, we reject the argument that the FOE is *per se* exempt from prosecution under R.C. 2915.02 because it is a "nonprofit" organization.

R.C. 2915.01(E) defines "scheme or game of chance conducted for profit" as "any scheme or game of chance *designed to produce income* for the person who conducts

---

organization exempt from federal income taxation under subsection 501(a) of the Internal Revenue Code. R.C. 2915.01(H) provides:

" 'Charitable organization' means any tax exempt religious, educational, veteran's, fraternal, service, nonprofit medical, volunteer rescue service, volunteer firemen's, senior citizen's, youth athletic, or youth athletic park organization. An organization is tax exempt if the organization is, and has received from the internal revenue service a determination letter that is currently in effect, stating that the organization is, exempt from federal income taxation under subsection 501(a) and described in subsection 501(c)(3), 501(c)(4), 501(c)(8), 501(c)(10), or 501(c)(19) of the Internal Revenue Code. To qualify as a charitable organization, an organization, except a volunteer rescue service or volunteer firemen's organization, shall have been in continuous existence as such in this state for a period of two years immediately preceding either the making of an application for a bingo license under section 2915.08 of the Revised Code or the conducting of any scheme of chance or game of chance as provided in division (C) of section 2915.02 of the Revised Code."

[2] R.C. 2915.01(M) provides:

" 'Fraternal organization' means any society , order, or association within this state, except a college or high school fraternity, that is not organized for profit, that is a branch, lodge, or chapter of a national or state organization, that exists exclusively for the common business or brotherhood of its members, and that has been in continuous existence in this state for a period of five years."

or operates the scheme or game of chance, but does not include a charitable bingo game." (Emphasis added.) Defining "profit" in relation to income is consistent with the common usage of that term. R.C.1.42.

Black's Law Dictionary (5 Ed. 1979) 1090, defines "profit" as: "Most commonly, the gross proceeds of a business transaction less the costs of the transaction; *i.e.* net proceeds. Excess of revenues over expenses for a transaction; sometimes used synonymously with net income for the period. Gain realized from business or investment over and above expenditures."

Applying this prevailing definition of profit, we see no reason why the income produced by the FOE's use of gambling devices is not "profit." To the extent its revenues exceed its expenses, the FOE certainly profits from its gambling activities. Granted, the FOE's status as a "nonprofit" institution may affect its use or the taxation of its gambling income. However, this status does not remove "gambling net income" from the definition of "profit."

Accordingly, we hold that a nonprofit organization may be convicted of gambling for profit under R.C. 2915.02. *State* v. *Stow Veterans Assn.* (1987), 35 Ohio App. 3d 45, 46-47, 519 N.E. 2d 660, 661-662.

Appellants next contend that R.C. 2915.02 is unconstitutional in that it exempts from prosecution certain gambling activities of some "charitable organizations" but not others.

It is clear appellant FOE is not exempt from prosecution under R.C.2915.02 by operation of division (D) thereof. Certain schemes of chance conducted by certain charitable organizations are exempt from prosecution pursuant to R.C. 2915.02(D)(1) and, as noted above, the FOE is a "charitable organization" within the meaning of R.C.2915.01(H). However, R.C. 2915.02(D)(1) by its

clear language limits the class of charitable organizations entitled to the exemption to subsection 501(c)(3) organizations that are operated exclusively for religious, charitable, scientific or like purposes.[3] Organizations such as the FOE, described in subsection 501(c)(8) of the Internal Revenue Code and operated exclusively for the

---

[3]R.C. 2915.02(D)(1) provides:

"This section does not apply to:

"(1) Schemes of chance conducted by a charitable organization that is, and has received from the Internal Revenue Service a determination letter that is currently in effect, stating that the organization is, exempt from federal income taxation under subsection 501(a) and described in subsection 501(c)(3) of the Internal Revenue Code, provided that all of the money or assets received from such scheme of chance after deduction only of prizes paid out during the conduct of the scheme of chance are used by, or given, donated, or otherwise transferred to, any organization that is described in subsection 509(a)(1), 509(a)(2), or 509(a)(3) of the Internal Revenue Code and is either a governmental unit or an organization that is tax exempt under subsection 501(a) and described in subsection 501(c)(3) of the Internal Revenue Code, and provided that the scheme of chance is not conducted during, or within ten hours of, a bingo game conducted for amusement purposes only pursuant to section 2915.12 of the Revised Code; * * * "

[4]R.C. 2915.02(D)(2) provides in pertinent part:

"This section does not apply to:

"* * *

"(2) Games of chance, if *all* of the following apply:

"* * *

"(b) The games are conducted by a charitable organization that is, and has received from the Internal Revenue Service a determination letter that is currently in effect, stating that the organization is, exempt from federal income taxation under subsection 501(a) and described in subsection 501(c)(3) of the Internal Revenue Code; * * *." (Emphasis added.)

benefit of their members, do not fall within this exemption. The exemption provided in R.C. 2915.02(D)(2) is inapplicable for the same reason.[4]

Having found that R.C.2915.02(D) does not exempt appellant FOE from prosecution, we must consider whether the General Assembly has denied appellant equal protection of the laws in exempting one class of charitable organizations to the exclusion of others. This issue was presented, but not resolved, in this court's recent decision in *State* v. *VFW Post 3562* (1988), 37 Ohio St. 3d 310, 316, 525 N.E.2d 773, 778-779. For the reasons that follow, we find no constitutional violation in this instance.

The exemptions enumerated in R.C.2915.02(D) are keyed to classifications created by Congress in subsection 501(c) of the Internal Revenue Code. It is certainly within the province of the General Assembly to incorporate federal statutory provisions into state legislation. *State, ex rel. Gabalac,* v. *Congregation* (1977), 55 Ohio App. 2d 96, 98, 9 O.O. 3d 242, 243, 379 N.E. 2d 242, 244-245. However, appellants contend that the statute is unconstitutional in that it impermissibly distinguishes between subsection 501(c)(3) and 501(c)(8) organizations. Appellants apparently fail to perceive any real distinction between the purposes and organization of the FOE and those of a church. We do.

We begin with the well-established presumption that statutes duly enacted by the General Assembly do not conflict with federal or state constitutional provisions. *Roosevelt Properties Co.* v. *Kinney* (1984), 12 Ohio St. 3d 7, 13, 12 OBR 6, 11, 465 N.E. 2d 421, 427; *State* v. *Renalist, Inc.* (1978), 56 Ohio St. 2d 276,278, 10 O.O. 3d 408, 409, 383 N.E. 2d 892, 894; R.C. 1.47(A). When there is a challenge to a statute on the grounds that it is being unconstitutionally applied, "the burden is upon the party making the attack to present clear and convincing

evidence of a presently existing state of facts which makes the Act unconstitutional and void when applied thereto." *Cleveland Gear Co.* v. *Limbach* (1988), 35 Ohio St. 3d 229, 231, 520 N.E. 2d 188, 191.

In the recent case of *Kadrmas* v. *Dickinson Pub. Schools* (1988), 487 U.S. ___ , ___ , 101 L. Ed. 2d 399, 409, 108 S. Ct. 2481,2487, the United States Supreme Court stated:

"Unless a statute provokes 'strict judicial scrutiny' because it interferes with a 'fundamental right' or discriminates against a 'suspect class,' it will ordinarily survive an equal protection attack so long as the challenged classification is rationally related to a legitimate governmental purpose."

With regard to the application of R.C.2915.02 to appellant FOE, no suspect classification is made and no fundamental right is curtailed. Accordingly, as with most social and economic legislation, we will uphold the classifications drawn by the statute if they are rationally related to a legitimate state interest. Accord *State* v. *Wyand* (1985),304 Md.721,726-727,501 A.2d 43, 46 *(quoting Cleburne* v. *Cleburne Living Center* [1985], 473 U.S. 432, 440); *State* v. *McCleary* (1983), 65 N.C. App. 174, 308 S.E. 2d 883, affirmed (1984),311 N.C.397,316 S.E.2d 870.

Subsections 501(c)(3) and 501(c)(8) describe two completely different classes of organizations.[5] Subsection

[5]Subsection 501(c)(3) organizations are:

"Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, * * * no part of the net earnings of which inures to the benefit of any private shareholder or induvidual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including

501(c)(3) institutions are "organized and operated exclusively for religious, charitable, scientific," or like purposes, whereas 501(c)(8) institutions are "[f]raternal beneficiary societies * * * operating under the lodge system or for the exclusive benefit of the members." Notably, for an organization to qualify under subsection 501(c)(3),"no part of the net earnings * * * [may] inure[] to the benefit of any private shareholder or individual * * *." On the other hand, a 501(c)(8) organization must provide "life, sick, accident, or other benefits *to the members* * * *."(Emphasis added.) While both 501(c)(3) and 501(c)(8) organizations are exempt from federal income taxation pursuant to subsection 501(a), these organizations do receive dissimilar treatment in other provisions of the federal tax code. For example, we note that contributions to 501(c)(3) corporations are always deductible, while those to 501(c)(8) organizations are deductible only by individuals and only if they are to be used exclusively for charitable purposes. Section 170 of the Internal Revenue Code.[6]

---

the publishing or distributing of statements), any political campaign on behalf of any candidate for public office."
Subsection 501(c)(8) organizations are:

"Fraternal beneficiary societies, orders, or associations —

"(A) operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system, and

"(B) providing for the payment of life, sick, accident, or other benefits to the members of such society, order, or association or their dependents."

[6]Section 170 provides in pertinent part:

"(a) Allowance of deduction. —

"(1) General rule. — There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year.* * *

"* * *

The definition of "charitable organization" in R.C.2915.01(H) does include both 501(c)(3) and 501(c)(8) organizations, and for some purposes, R.C. Chapter

"(c) Charitable Contribution Defined. — For purposes of this section, the term 'charitable contribution' means a contribution or gift to or for the use of —

"* * *

"(2) A corporation, trust, or community chest, fund, or foundation —

"(A) created or organized in the United States or in any possession thereof,or under the law of the United States, any State, the District of Columbia, or any possession of the United States;

"(B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals;

"(C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and

"(D) which is not disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements) any political campaign on behalf of any candidate for public office.

"A contribution or gift by a corporation to a trust, chest, fund, or foundation shall be deductible by reason of this paragraph only if it is to be used within the United States or any of its possessions exclusively for purposes specified in subparagraph (B). Rules similar to the rules of section 501(j) shall apply for purposes of this paragraph.

"* * *

"(4) In the case of a contribution or gift by an individual, a domestic fraternal society, order, or association, operating under the lodge system, but only if such contribution or gift is to be used exclusively for religious, charitable scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals."

2915 does treat 501(c)(3) and 501(c)(8) organizations alike. For example, both 501(c)(3) and 501(c)(8) organizations can apply for a license to conduct bingo games. See R.C. 2915.08(A)(4). However, for purposes of the R.C.2915.02(D) exemptions, the General Assembly chose to include only 501(c)(3) organizations. We find this choice to be supported by the legitimate state interest not to prohibit certain gambling activities, the proceeds of which are used exclusively for public and charitable purposes and do not inure to the benefit of individual members of the organization. See, *e.g., State* v. *McCleary, supra,* at 188, 308 S.E. 2d at 893. The exemptions set forth in R.C. 2915.02(D) are rationally related to that interest, and thus we find no equal protection violation.

Whether 501(c)(8) organizations should also be exempted from prosecution under R.C. 2915.02 is a question strictly within the province of the General Assembly. It is not for this court to substitute its judgment on such an issue.

Accordingly, we hold that R.C. 2915.02(D) does not deny equal protection of the laws by exempting from the operation of R.C. 2915.02 organizations described in subsection 501(c)(3) of the Internal Revenue Code and not organizations described in subsection 501(c)(8) thereof.

II

Appellants next contend essentially that Detective Cook's visit on May 7, 1986 constituted a warrantless search in violation of the Fourth and Fourteenth Amendments to the United States Constitution and Section 14, Article I of the Ohio Constitution. It is undisputed that no warrant was issued for Cook's search on that date. Cook did obtain a warrant on May 9, 1986, based on the observations he made during his May 7

visit.

We begin our analysis by recognizing that "a search conducted without a warrant issued upon probable cause is '*per se* unreasonable * * * subject only to a few specifically established and well-delineated exceptions.'" *Schneckloth* v. *Bustamonte* (1973), 412 U.S. 218, 219 (quoting *Katz* v. *United States* [1967], 389 U.S. 347, 357). Consequently, evidence obtained in a warrantless search is generally inadmissible, and under the "fruit of the poisonous tree" doctrine, such evidence cannot serve as probable cause to support a subsequent warrant. *Segura* v. *United States* (1984), 468 U.S. 796, 804 (citing *Wong Sun* v. *United States* [1963], 371 U.S. 471, 484).[7] However, "one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." *Schneckloth, supra,* at 219 (citing *Davis* v. *United States* [1946], 328 U.S. 582, 593-594).

As the United States Supreme Court has held, "[t]he touchstone of Fourth Amendment analysis is whether a person has a 'constitutionally protected reasonable expectation of privacy.' " *California* v. *Ciraolo* (1986), 476 U.S. 207, 211 (quoting *Katz, supra,* at 360). Accordingly, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz, supra,* at 351. Entry into a home or office with the consent of the owner or occupier is thus not a "search" within the protection of the Fourth Amendment. *Maryland* v. *Macon* (1985), 472 U.S 463, 469.

To rely on the consent exception of the warrant requirement, the state must show by "clear and positive" evidence that the consent was "freely and voluntarily" given. *Bumper* v. *North Carolina* (1968), 391 U.S. 543,

[7]Because we find that Cook's entry on May 7 was lawful, we need not discuss whether there is independent evidence to support the May 9 warrant. *Segura, supra,* at 805.

548; *State* v. *Danby* (1983), 11 Ohio App. 3d 38, 41, 11 OBR 71, 74, 463 N.E. 2d 47, 50. In *Schneckloth, supra,* at 227, the United States Supreme Court held that "whether a consent to search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances." Appellants argue that there was no voluntary consent here because Cook did not identify himself as a law enforcement officer and did not explain that his purpose was to investigate alleged illegal gambling. However, we find that under the totality of the circumstances, consent was freely and voluntarily given and there was no deception perpetrated.

Prior to the *Katz* "reasonable expectation of privacy" analysis the United States Supreme Court in several cases considered the consent issue in the context of so-called "deception." In the first of these cases, *Gouled* v. *United States* (1921), 255 U.S. 298, a business acquaintance of the defendant, acting under the orders of federal officers, entered the defendant's office on the pretense of a social visit. In the defendant's absence the acquaintance searched for and seized incriminating papers. The court held that the deceptive entry and the seizure were unconstitutional. But, see, *Warden* v. *Hayden* (1967), 387 U.S. 294 (rejecting the premises on which *Gouled* was based).

In the next case, *On Lee* v. *United States* (1952), 343 U.S. 747, the government placed a body microphone on an acquaintance of the defendant in an attempt to get the defendant to incriminate himself. The court held that the taped conversation was admissible, as the acquaintance was on the defendant's premises with consent and thus there was no "trespass." This case was followed by *Lopez* v. *United States* (1963), 373 U.S. 427, when the court found no constitutional violation where

an IRS agent wore a body microphone and obtained incriminating statements from the defendant who had previously bribed the agent.

Finally, in 1966 the court sustained consensual entries of undercover officers in two cases. In *Lewis* v. *United States* (1966), 385 U.S. 206, a federal narcotics agent expressed a willingness to purchase narcotics and was twice invited into the defendant's home to consummate the sales. The court held that by inviting the agent into his home, "a commercial center * * * of * * * unlawful business," *id.* at 211, the defendant had consented to the agent's presence and thus to the use of the agent's testimony as to what had transpired. The *Lewis* case was decided the same day as *Hoffa* v. *United States* (1966), 385 U.S. 295, in which the court found that the defendant had no expectation of privacy, and thus no Fourth Amendment protection, relating to conversations heard by an invited guest who was in fact a paid government informant.

This court had occasion to review this line of cases *State* v. *Pi Kappa Alpha Fraternity* (1986), 23 Ohio St. 3d 141, 23 OBR 295, 491 N.E. 2d 1129. In that case, liquor control agents were invited to enter a fraternity house when one agent purported to be an alumnus of another chapter and stated that his brother might be interested in joining the fraternity. Once inside the agents observed the illegal sale of alcohol. Following *Lewis* and *Gouled,* we held that the fraternity house manager had not freely and voluntarily consented to the agent's search. The key factors supporting this holding were set forth in the syllabus:

"Pursuant to Section 14, Article I of the Ohio Constitution, and in the absence of any judicially recognized exception to the warrant requirement, government officers are not privileged to deceptively gain entry into the private home or office of another without a warrant,

where such home or office is not a commercial center of criminal activity, and where the invitation to enter the private home or office was not extended by the occupant for the purpose of conducting illegal activities."

Analyzing these key factors, we find the circumstances of this case to be significantly different from those in *Pi Kappa Alpha.* Here the only thing "deceptive" about Cook's entry was the fact that he did not openly identify himself as a law enforcement officer. He certainly did not affirmatively *misrepresent* his identity or lie to the doorkeeper about his intentions as did the liquor control agents in *Pi Kappa Alpha.* He entered the post as a guest of a member as could any member of the general public, and the fact that apparently no credentials were checked at the door is further indication that the FOE had no "reasonable expectation of privacy." *Commonwealth* v. *D'Onofrio* (1986), 396 Mass. 711, 488 N.E. 2d 410. Thus, this case is similar to *Macon, supra,* in which the United States Supreme Court held that an undercover officer's entrance into an adult bookstore by posing as a customer to make a buy did not violate the Fourth Amendment. See, also, *Cleveland* v. *Mart* (1983), 10 Ohio App. 3d 210, 211-212, 10 OBR 284, 286, 461 N.E. 2d 316, 318.

The most important distinction between this case and the *Pi Kappa Alpha* case is the purpose for which the invitation to enter was extended. In *Pi Kappa Alpha,* "[t]he invitation extended by the fraternity house manager, * * * was clearly made for the purpose of exhibiting the fraternity house with the probable goal of recruiting a potential member." *Id* at 144, 23 OBR at 297, 491 N.E. 2d at 1132. There was no relationship between the invitation and the illegal sales of beer being conducted within the house.

By contrast, here, Cook and his informant companion were clearly invited into the club for the purpose of ob-

serving and engaging in the club's activities, including its gambling activities. Thus, this case is distinguishable from the many cases in which undercover police gain entrance to the defendant's premises by posing as individuals engaged in purely *legal* transactions. See *Pi Kappa Alpha, supra;* Annotation, Officer's Ruse to Gain Entry as Affecting Admissibility of Plain View Evidence - modern cases (1986), 47 A.L.R. 4th 425. Unlike *Pi Kappa Alpha,* the United States Supreme Court's decision in *Lewis* is directly on point here, as are other cases which found no Fourth Amendment violation where an undercover officer posed as a participant in the illegal activity being investigated. See, *e.g., United States* v. *Goldstein* (N.D. III. 1985), 611 F. Supp. 624; *United States* v. *Osorio de Santiago* (D.P.R. 1986), 626 F. Supp. 329, affirmed (C.A. 1, 1987),828 F. 2d 866.

Accordingly, we hold that when an individual gives consent to another to enter a private area wherein illegal activities are being conducted, the consent does not lose its status of being freely and voluntarily given merely because it would not have been given but for the fact that the other person failed to identify himself as a police officer or agent.

III

In summary, we hold that the trial court incorrectly granted appellants' motions to dismiss, as a nonprofit corporation can be found guilty of gambling for profit and R.C. 2915.02 does not deny equal protection of the laws to subsection 501(c)(8) organizations such as appellant FOE. We also hold that the trial court correctly overruled appellants' motions to suppress, as Detective Cook's entry into the lodge was not deceptive.

Accordingly, the judgment of the court of appeals is affirmed.

*Judgment affirmed.*

Moyer, C.J., Locher and H. Brown, JJ., concur.

Sweeney, Holmes and Douglas, JJ., concur in part and dissent in part.

Sweeney, J., concurring in part and dissenting in part. I must respectfully dissent from the majority's disposition of the search and seizure issue presented in the case *sub judice* because the majority ignores basic constitutional imperatives and the applicable decisional law enunciated by this court and the federal judiciary.

The majority correctly acknowledges that searches conducted without the authorization of a valid search warrant are not favored in the law. See *G.M. Leasing Corp.* v. *United States* (1977), 429 U.S. 338, 352-353; *Camara* v. *Municipal Court* (1967), 387 U.S. 523, 528-529; *Stoner* v. *California* (1964), 376 U.S. 483, 486; *United States* v. *Jeffers* (1951), 342 U.S. 48, 51-52; *McDonald* v. *United States* (1948), 335 U.S. 451, 454-455; and *Agnello* v. *United States* (1925), 269 U.S. 20, 32-33.

Nevertheless, the majority concludes that the "consent" to search in the present case obviated the necessity of a warrant. A review of the facts of this case in the context of prior state and federal decisions reveals that the majority is grossly mistaken.

While actual consent to search is a recognized exception to the warrant requirement, the government bears the burden of demonstrating that the consent was "freely and voluntarily given." *Bumper* v. *North Carolina* (1968), 391 U.S. 543, 548. See, also, *Gatlin* v. *United States* (C.A.D.C. 1963), 326 F. 2d 666, 673; and *Judd* v. *United States* (C.A.D.C. 1951), 190 F. 2d 649, 650-651. Such burden is not met where consent is predicated upon mere acquiescence in a search. *Bumper* v. *North Carolina, supra,* at 548-549; *Johnson* v. *United*

*States* (1948), 333 U.S. 10, 13; *Unites States* v. *Rothman* (C.A. 9, 1973), 492 F. 2d 1260, 1265;and *United States* v. *Davis* (C.A. 9, 1973), 482 F. 2d 893. Similarly, consent may not be implied merely because governmental entry was occasioned by the absence of physical obstructions. Thus, in *Keiningham* v. *United States* (C.A.D.C. 1960, 287 F. 2d 126, 130, the federal appellate court observed: "We think that a person's right to privacy in his home (and the limitation of authority to a searching police officer) is governed by something more than the fortuitous circumstance of an unlocked door * * *." See, also, *State* v. *Akron Airport Post No. 8975* (1985), 19 Ohio St. 3d 49, 51, 19 OBR 42, 43, 482 N.E. 2d 606, 608; *Smith* v. *United States* (C.A.D.C. 1965), 353 F. 2d 877, 881 (Edgerton, J., concurring); *Nueslein* v. *Dist. of Columbia* (C.A.D.C. 1940), 115 F. 2d 690.

Similarly, where actual consent is expressed but elicited through artifice, it cannot be deemed to be unequivocal, specific and freely and intelligently given. Such is the clear holding of this court in *State* v. *Pi Kappa Alpha Fraternity* (1986), 23 Ohio St. 3d 141, 23 OBR 295, 491 N.E. 2d 1129. The syllabus thereto provides as follows:

"Pursuant to Section 14, Article I of the Ohio Constitution, and in the absence of any judicially recognized exception to the warrant requirement, government officers are not privileged to deceptively gain entry into the private home or office of another without a warrant, where such home or office is not a commercial center of criminal activity, and where the invitation to enter the private home or office was not extended by the occupant for the purpose of conducting illegal activities."

*Pi Kappa Alpha* is wholly consistent with the view of the Fourth Amendment expressed by the United States Supreme Court that a warrantless search may not be predicated upon consent procured by stealth or decep-

tion. *Gouled* v. *United States* (1921), 255 U.S. 298, 306. Moreover, federal decisions have invalidated such searches whether founded upon active deception, *Gatewood* v. *United States* (C.A.D.C. 1953), 209 F. 2d 789, or the "silent misrepresentation" of governmental officers, *United States* v. *Tweel* (C.A. 5, 1977), 550 F. 2d 297, 299.

In *Fraternal Order of Eagles, No 778* v. *United States* (C.A. 3, 1932), 57 F. 2d 93, revenue agents gained access to the premises of a fraternal organization through the use of fraudulent membership cards. The Third Circuit Court of Appeals, finding the subsequent search and seizure illegal, remarked:

"A search made as the result of an entry by physical force is not necessary in order to violate the Fourth Amendment. That amendment: was designed to protect the individual against the abuse of official authority. A search and seizure following an entry into the house or office of a person suspected of crime by means of fraud, stealth, social acquaintance, or under the guise of a business call are unreasonable and violate the Fourth Amendment." *Id.* at 94.

The facts of *Fraternal order of Eagles, No. 778* are virtually identical to those presented at bar. In the case *sub judice,* the deputy sheriff and his companion entered the premises unimpeded and observed devices which they perceived to be gambling paraphernalia. The record is inconclusive as to the motivating factors behind the decision to permit entry to the lodge. Whether entry was procured through the presentation of membership credentials or obtained irrespective thereof is of no legal significance. Assuming *arguendo* that entry was accompanied by mere acquiescence on the part of the club members or that the deputy simply availed himself of an "open door," such circumstances do not constitute a valid consent to search. It is therefore immaterial

whether membership credentials would have been requested had they not been immediately presented to the person from whom entry was secured. The majority has sought to distinguish the facts of this case from those presented in *Pi Kappa Alpha.* To do so, the majority has indulged in the assumption that the law enforcement officer was actively solicited to enter the club "for the purpose of observing and engaging in the club's activities, including its gambling activities." There is nothing in the record to support this assertion.[8] If any reasonable assumption is to be drawn from the interchange between the officer and his companion and the doorkeeper, it is that admittance was granted as a result of the membership credentials presented at that time. Thus, the deception employed by the officer in the case *sub judice* is factually indistinguishable from that practiced by the liquor agent in *Pi Kappa Alpha.* The most puzzling aspect of the majority opinion is its reliance upon the language of *Pi Kappa Alpha* that the invitation to enter in that case was extended "for the purpose of exhibiting the fraternity house with the probable goal of recruiting a potential member." *Id.* at 144, 23 OBR at 297, 491 N.E. 2d at 1132. In contrast, the present case involves an effort to accommodate a purported member in the enjoyment of benefits conferred by an existing membership - the ability to patronize a particular liquor establishment presumably possessing a D-4 permit. (See R.C. 4303. 17) This, indeed, is a most important distinction! In reality, the majority's tortured logic produces nothing more than a distinction without a difference.

Apparently, the majority places great reliance upon

---

[8] There is likewise no support in the record for the bald statement by the majority that "no credentials were checked at the door." While no credentials were requested, they were presented and presumably the doorkeeper took notice of this fact.

the fact that the credentials were not presented by the officer but by his companion. Thus, it is the conclusion of the majority that the officer "entered the post as a guest of a member as could any member of the general public." The crucial distinction, however, is that the officer was *not* a member of the general public but deceived the post into thinking that he was. This active deception to gain entry is what distinguishes this case from those in which an officer is solicited to engage in criminal activities - a distinction clearly recognized in *Pi Kappa Alpha.* Applying the logic of the majority, there is nothing preventing a law enforcement officer from applying for and receiving membership in any number of fraternal organizations since so can "any member of the general public." Accordingly, admittance predicated upon presentation of such credentials would, in the majority's view, be deemed consensual despite the clear holding of *Fraternal Order of Eagles, No. 778, supra.* It is less than comforting to know that, through such a process, the constitutional protections afforded by Section 14, Article I of the Ohio Constitution and the Fourth Amendment to the United States Constitution may be purchased clandestinely by the authorities.

One final aspect of this case is also worth noting. The majority correctly acknowledges that " 'a search conducted without a warrant issued upon probable cause is "per se" unreasonable. * * *' " The majority further concedes that the informant accompanying Detective Cook had been a reliable source of information in the past. Nevertheless, the state failed to seek a search warrant based upon the information provided. In support of the decision to forego any attempt to secure a search warrant, appellees indicate that a warrant under the circumstances at bar could not have been obtained. Appellees apparently are suggesting that the information regarding gambling activities on the subject

premises provided by the informant was insufficient for a judicial officer to conclude that probable cause of criminal activity existed and that issuance of a search warrant was justified. In my view, this argument is not persuasive. If probable cause to search was lacking, the employment of subterfuge to obviate the need for a warrant should not remedy the deficiency. As succinctly stated by the federal appellate court in *Nueslein* v. *Dist. of Columbia, supra,* at 693: "The absence of a search warrant could scarcely make good an entry for which no warrant could have been obtained."

Nevertheless, the majority has countenanced a search unauthorized by a warrant and totally unsupported by probable cause, but instead justified by a misplaced reliance upon "consent" procured by deception. In so doing, the decision reduces constitutional protections to a game of bluff which would rival any of the activities to which R.C. Chapter 2915 is directed. Unfortunately, the stakes in this case are much higher. I would reverse the denial of the motions to suppress.

Holmes and Douglas, JJ., concur in the foregoing opinion.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

| | | |
|---|---|---|
| State of Ohio, Plaintiff-Appellant, | : | |
| v. | : | No. 86AP-1132 |
| Jesse Posey, Sr., Defendant-Appellee, (Cross-Appellant), | : | (REGULAR CALENDAR) |
| State of Ohio, Plaintiff-Appellant, | : | |
| v. | : | No. 86AP-1162 |
| Fraternal Order of Eagles Post 3261, Defendants-Appellees, (Cross-Appellants), | : | (REGULAR CALENDAR) |
| State of Ohio, Plaintiff-Appellant, | : | |
| v. | : | No. 86AP-1163 |
| Sharon Parker, Defendant-Appellee, (Cross-Appellant). | : | (REGULAR CALENDAR) |

OPINION
Rendered on July 28, 1987

MR. RONALD J. O'BRIEN, City Attorney, MR. JAMES J.FAIS, City Prosecutor, and MR. DAVID E. TINGLEY, for appellant.

JOHN A. CONNOR, II CO., L.P.A., MR. JOHN A. CONNOR, II, and MR. DARRELL E. FAWLEY, JR., for appellees.

APPEAL from the Franklin County Municipal Court.

YOUNG, J.

Detective Ernest Cook entered the premises of the Fraternal Order of Eagles Post 3261 in Reynoldsburg, accompanied by a female member of the club. Although the police officer's companion was not a member of that particular branch or Aerie, she had requested that Detective Cook accompany her because of the gambling in the club that she had observed earlier. After gaining admittance inside the club, Detective Cook made observations on the premises of gambling activities such as draw poker machines, tip ticket purchases and card games. He, himself, purchased tip tickets from the cashier. Based on these observations, he filed charges asserting that the appellees violated the provisions of R.C. 2915.02. A motion to dismiss was filed on behalf of appellees. The motion to dismiss was sustained and the city prosecutor has appealed. Appellees also filed a cross-appeal with respect to the overruling of their motion to suppress so that all relevant issues would be before this court.

Appellant asserts the following assignment of error:

"The trial court erred in its determination that Ohio fraternal organizations are per se exempt from those portions of section 2915.02 Ohio Revised Code, which prohibit gambling for profit."

Appellees asserted the following assignment of error on cross-appeal:

"The trial court erred in overruling defendant/appellee/cross-appellant's motion to suppress the evidence due to an illegal search and seizure by the Franklin County Sheriff's Department."

Appellant asserts that the trial court erred in its

determination that fraternal organizations, such as the Eagles, are per se exempt from the sections of R.C. 2915.02 which prohibit gambling for profit.

R.C. 2915.02 states, in pertinent part:

"(A) No person shall:

" * * *

"(2) Establish, promote or operate, or knowingly engage in conduct that facilitates any scheme or game of chance conducted for profit;"

"Scheme of chance" is defined in R.C. 2915.01 (C) as:

" * * * [A] lottery, numbers game, pool, or other scheme in which a participant gives a valuable consideration for a chance to win a prize."

" Game of chance" is defined in R.C. 2915.01 (D) as:

" * * * [P]oker, craps, roulette, a slot machine, a punch board, or other game in which a player gives anything of value in the hope of gain, the outcome of which is determined largely or wholly by chance."

R.C. 2915.01 (E) defines "scheme or game of chance conducted for profit" as:

" * * * [A]ny scheme or game of chance designed to produce income for the person who conducts or operates the scheme or game of chance, but does not include a charitable bingo game."

Appellant sets forth in its sole assignment of error that the trial court erred in determining that the Eagles, a fraternal organization, was per se exempt from portions of R.C. 2915.02 which prohibits gambling for profit. R.C. 2915.01 (H) states, in pertinent part:

"(H) 'Charitable organization' means any tax exempt * * * fraternal, * * * organization. An organization is tax exempt if the organization is, and has received from the internal revenue service a determination letter that is currently in effect, stat-

ing that the organization is, exempt from federal income taxation under subsection 501(a) and described in subsection 501 (c)(3), 501(c)(4), 501(c)(8), * * * of the Internal Revenue Code. * * *"

It is uncontroverted that appellee retains 501(c)(8) status according to the guidelines established in Section 26, U.S.C. 501(a) of the Internal Revenue Code. It is also clear, from a reading of R.C. 2915.01 (H), that because of appllees' 501(c)(8) status, it is considered to be a charitable organization under Ohio law. However, the language of R.C. 2915.02 only excludes organizations that are described in subsection 501(c)(3) and does not make an exception for those organizations described in 501(c)(8). The relevant language of R.C. 2915.02(D)(1) reads as follows:

"(D) This section does not apply to:
"(1) Schemes of chance conducted by a charitable organization that is, and has received from the internal revenue service a determination letter that is currently in effect, stating that the organization is, exempt from federal income taxation under subsection 501(a) and described in subsection 501(c)(3) of the internal revenue code ***."

This section mentions section 501(c)(3) organizations but does not mention 501(c)(8) organizations. Thus, in applying the "expressio unius est exclusio alterius" maxim, the mention of one thing implies the exclusion of another, the legislature clearly intended to exclude 501(c)(8) organizations. Appellees assert R.C. 2915.02 violates the Equal Protection Clause since it makes a distinction as to the different types or classes of tax exempt organizations described in the various subsections of section 501 of the Internal Revenue Code. In essence, R.C. 2915.02 exempts 501(c)(3) organizations, whose net earnings cannot be used to benefit individual

members, from gambling for profit and does not exempt 501(c)(8) organizations, whose exclusive operation is for the benefit of its members. Laws that differentiate between different classes are constitutional if the grounds for classification are reasonable and substantial. *State, ex rel. Burton, Pros. Atty.,* v. *Greater Portsmouth Growth Corp.* (1966), 7 Ohio St. 2d 34, 37.

Legislation in the areas of economics, social lifestyles and taxation, which limits some people's liberty but not others and does not involve a fundamental right, is more likely to be upheld when a rationality test is applied. See *Denicola* v. *Providence Hospital* (1979), 57 Ohio St. 2d 115, 119, Furthermore, an enactment of the General Assembly carries a strong presumption of constitutionality. See *American Cancer Society, Inc.* v. *City of Dayton* (1953), 160 Ohio St. 114; *Village of Strongsville* v. *McPhee* (1944), 142 Ohio St. 534. Gambling for profit is not within the realm of a fundamental right acquired by a non-profit fraternal organization. Therefore, the trial court erred in its determination that Ohio fraternal organizations are *per se* exempt from those portions of R.C. 2915.02 which prohibit gambling for profit.

Although not specifically asserted in appellant's assignment of error, the trial court below and both counsel in their appellate briefs, address the issue as to whether a non-profit fraternal organization can gamble "for profit." In fact, the trial court based its dismissal on this issue and the equal protection issue. Although the issue of "whether the element 'for profit' can be proven against non-profit fraternal organizations"[1] is currently pending before the Ohio Supreme Court[2], this court is

---

[1] See R.C. 2915.01 (H)

[2] *State* v. *VFW Post 3562* (Jan. 14, 1987), Summit County App. No. 12600, unreported; *State* v. *FOE Aerie 2295 Port Clinton* (Jan. 9, 1987), Ottawa County App. No. OT-86-27, un-

bound by the precedent which has been established. This court has previously stated that for purposes of gambling, "for profit" means any income, as opposed to net profit. See *State* v. *Hartley, et al.* (Apr. 17, 1975), Franklin App. Nos. 74AP-487,488, 489, 490, 491, 492, 493, 494, 495, unreported (1975 Opinions 873); R.C. 2915.01 (E).

Appellees contend that the state failed to proffer evidence, as a matter of law, to prove that the schemes or games of chance engaged in by appellees were conducted for profit. Although R.C. 2915.01 *et seq.* does not prohibit gambling, other than bookmaking, which is not conducted for profit, it does prohibit the business of gambling for profit as well as various peripheral activities which support it. Upon review of the facts before this court, there is evidence which could establish a prima facie case that the activities that were being engaged in by the Eagles Club patrons were designed to produce income. See *State* v. *Eley* (1978), 56 Ohio St. 2d 169. The detective's testimony at the motion hearing is as follows:

> "We observed illegal gambling devices, such as electronic draw poker machines. We observed the bartender making change for these machines and making payoffs. We also observed instant win tickets were being sold by the bartender and another individual that was present at that time." [Tr. 5]

The plain and ordinary meaning of the words found in R.C. 2915.01 (D) and 2915.01(F)(3) makes draw poker machines gambling devices *per se. Mills-Jennings, Inc.*, v. *Dept. of Liquor Control* (1982), 70 Ohio St. 2d 95.

---

reported. These cases are factually different since they involve searches by liquor control agents enforcing the state liquor laws.

From this evidence, we adopt the reasoning of the Ninth District Court of Appeals in that logic and common sense dictate that the machines were designed to produce income and that the money inserted by club patrons was being collected by the Eagles Club. The amount collected, large or small, is irrelevant so long as a portion of the money used to play the machines by club members accrued to the club itself. *State* v. *Falls Moose Lodge No. 918* (Jul. 20, 1983), Summit County App. No. 1101, unreported; See, also, *State* v. *Moose Club No. 1234* (1985), 25 Ohio App. 3d 18.

Based on the foregoing analysis, appellant should have an opportunity on remand to establish a prima facie case that appellees were gambling for profit in violation of R.C. 2915.02. Therefore, dismissal was not proper. Appellant's sole assignment of error is well-taken and is sustained.

Appellees contend in their sole cross-assignment of error that the trial court erred in overruling their motion to suppress. The trial court has broad discretion in the admission and exclusion of evidence unless it clearly abused its discretion and the defendant has been materially prejudiced thereby. See *State* v. *Hymore* (1967), 9 Ohio St. 2d 122, 128. Upon review, the evidence shows that the police detective's entry into the building was lawful. The police detective's testimony is as follows:

> "A. Approximately an hour before, I met with a confidential informant that had gave me information that the Eagles Club was conducting illegal gambling activity. Myself and the informant went to the location in question, went up to the door. The informant rang a buzzer, knocked on the door. Instantly the door opened. A female white said, 'Come on in.' The confidential informant did have credentials as being a member of the Fraternal

Order of Eagles.

"Q. How do you know this?

"A. They were shown to me, and they were in the informant's hand. But the individual that let us in never attempted or asked to see the credentials.

"Q. Are you indicating these credentials were displayed to the doorkeeper?

"A. Yes." [Tr. 4-5]

Based on this uncontroverted testimony, the police detective was a guest of an Eagles Club member who had all the reciprocal rights and privileges to enter into the Reynoldsburg club branch and invite a guest to join her. Furthermore, the doorkeeper did not challenge the police detective's entry as a guest.

Based on these facts, the police detective's presence within the club was lawful. Therefore, the trial court did not abuse its discretion in overruling appellees' motion to suppress evidence. Appellees' sole cross-assignment of error is not well-taken and is overruled.

Accordingly, the judgment of the Franklin County Municipal Court is reversed in part, affirmed in part, and the cause is remanded for further proceedings in accordance with law and this opinion.

*Judgment reversed in part,*
*affirmed in part,*
*and cause remanded.*

BOWMAN and COOK, JJ., concur.

COOK, J., of the Eleventh Appellate District, sitting by assignment in the Tenth Appellate District.

## U.S. CONSTITUTION

### AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

### AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### 26 USC § 170

"(a) Allowance of deduction.-

"(1) General rule.- There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year.* * *

"* * *

"(c) Charitable Contribution Defined. - For purposes of this section, the term 'charitable contribution' means a contribution or gift to or for the use of-

"* * *

"(2) A corporation, trust, or community chest, fund, or foundation -

"(A) created or organized in the United States or in

any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States;

"(B) organized and operated exclusively for religious, charitable, scientific, literary or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment) or for the prevention of cruelty to children or animals;

"(C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and

"(D) which is not disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements) any political campaign on behalf of any candidate for public office.

"A contribution or gift by a corporation to a trust, chest, fund, or foundation shall be deductible by reason of this paragraph only if it is to be used within the United States or any of its possessions exclusively for purposes specified in subparagraph (B). Rules similar to the rules of section 501(j) shall apply for purposes of this paragraph.

" * * *

"(4) In the case of a contribution or gift by an individual, a domestic fraternal society, order, or association, operating under the lodge system, but only if such contribution or gift is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals."

26 USC § 501. Exemption from tax on corporations, certain trusts, etc.

(a) Exemption from taxation,

An organization described in subsection (c) or (d) or

section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503.

• • • •

(c) List of exempt organizations.

The following organizations are referred to in subsection (a):

• • • •

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)),and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

• • • •

(8) Fraternal beneficiary societies, orders, or associations-

(A) operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system, and

(B) providing for the payment of life, sick, accident, or other benefits to the members of such society, order, or association or their dependents.

• • • •

28 USC § 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest

court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

## Ohio Revised Code

§ 2915.01 Definitions.

As used in sections 2915.01 to 2915.12 of the Revised Code:

(A) "Bookmaking" means the business of receiving or paying off bets.

(b) "Bet" means the hazarding of anything of value upon the result of an event, undertaking, or contingency, but does not include a bona fide business risk.

(C) "Scheme of chance" means a lottery, numbers game, pool, or other scheme in which a participant gives a valuable consideration for a chance to win a prize.

(D) "Game of chance" means poker, craps, roulette, a slot machine, a punch board, or other game in which a player gives anything of value in the hope of gain, the outcome of which is determined largely or wholly by chance.

(E) "Scheme or game of chance conducted for profit" means any scheme or game of chance designed to produce income for the person who conducts or operates the scheme or game of chance, but does not include a charitable bingo game.

(F) "Gambling device" means:

(1) A book, totalizer, or other equipment for recording

bets;

(2) A ticket, token, or other device representing a chance, share, or interest in a scheme of chance, except a charitable bingo game, or evidencing a bet;

(3) A deck of cards, dice, gaming table, roulette wheel, slot machine, punch board, or other apparatus designed for use in connection with a game of chance;

(4) Any equipment, device, apparatus, or paraphernalia specially designed for gambling purposes.

(G) "Gambling offense" means any of the following:

(1) A violation of section 2915.02, 2915.03, 2915.04, 2915.05, 2915.06, 2915.07, 2915.08, 2915.09, 2915.10, or 2915.11 of the Revised Code;

(2) A violation of an existing or former municipal ordinance or law of this or any other state or the United States substantially equivalent to any section listed in division (G) of this section;

(3) An offense under an existing or former municipal ordinance or law of this or any other state or the United States, of which gambling is an element;

(4) A conspiracy or attempt to commit, or complicity in committing any offense under division (G) (1), (2), or (3) of this section.

(H) "Charitable organization" means any tax exempt religious, educational, veteran's, fraternal, service, nonprofit medical, volunteer rescue service, volunteer firemen's, senior citizen's, youth athletic, or youth athletic park organization. An organization is tax exempt if the organization is and has received from the internal revenue service a determination letter that is currently in effect, stating that the organization is, exempt from federal income taxation under subsection 501 (a) and described in subsection 501 (c) (3), 501 (c) (4), 501 (c) (8), 501 (c) (10), or 501 (c) (19) of the Internal Revenue Code. To qualify as a charitable organization, an organization, except a volunteer rescue service or volunteer firemen's

organization, shall have been in continuous existence as such in this state for a period of two years immediately preceding either the making of an application for a bingo license under section 2915.08 of the Revised Code or the conducting of any scheme of chance or game of chance as provided in division (C) of section 2915.02 of the Revised Code.

(I) "Religious organization" means any church, body of communicants, or group that is not organized or operated for profit, that gathers in common membership for regular worship and religious observances.

**§ 2915.01**

(J) "Educational organization" means any organization within this state that is not organized for profit, the primary purpose of which is to educate and develop the capabilities of individuals through instruction, and that operates or contributes to the support of a school, academy, college, or university.

(K) "Veteran's organization" means any veteran's organization or association that is incorporated by an act of the United States congress or any auxiliary unit of that veteran's organization or association, and any post of a national veteran's organization the national dues paying membership of which numbers at least five thousand persons, whether or not incorporated by an act of the United States congress, which post has been in continuous existence as such in this state for at least twenty years and has been incorporated as a nonprofit corporation for at least five years.

(L) "Volunteer firemen's organization" means any organization of volunteer firemen, as defined in section 146.01 of the Revised Code, that is organized and operated exclusively to provide financial support for a volunteer fire department or a volunteer fire company.

(M) "Fraternal organization" means any society, order, or association within this state, except a college

or high school fraternity, that is not organized for profit, that is a branch, lodge, or chapter of a national or state organization, that exists exclusively for the common business or brotherhood of its members, and that has been in continuous existence in this state for a period of five years.

(N) "Volunteer rescue service organization" means any organization of volunteers organized to perform emergency medical service as defined in division (E) of section 4731.82 of the Revised Code.

(O) "Service organization" means any organization, not organized for profit, that is organized and operated exclusively to provide, or to contribute to the support of organizations or institutions organized and operated exclusively to provide, medical and therapeutic services for persons who are crippled, born with birth defects, or have any other mental or physical defect or those organized and operated exclusively to protect, or to contribute to the support of organizations or institutions organized and operated exclusively to protect, animals from inhumane treatment.

(P) "Nonprofit medical organization" means any organization that has been incorporated as a nonprofit corporation for at least five years and that has continuously operated and will be operated exclusively to provide, or to contribute to the support of organizations or institutions organized and operated exclusively to provide, hospital, medical, research, or therapeutic services for the public.

(Q) "Senior citizen's organization" means any private organization, not organized for profit, that is organized and operated exclusively to provide recreational or social services for persons who are fifty five years of age or older and that is described and qualified under subsection 501 (c) (3) of the Internal Revenue Code.

(R) "Charitable bingo game" means any bingo game

that is conducted by a charitable organization that has obtained a bingo license pursuant to section 2915.08 of the Revised Code and the proceeds of which are used for a charitable purpose.

(S) "Bingo" means:

(1) A game with all of the following characteristics:

(a) The participants use bingo cards that are divided into twenty-five spaces arranged in five horizontal and five vertical rows of spaces, with each space, except the central space, being designated by a combination of a letter and a number and with the central space being designated as a free space;

(b) The participants cover the spaces on the bingo cards that correspond to combinations of letters and numbers that are announced by a bingo game operator;

(c) A bingo game operator announces combinations of letters and numbers that appear on objects that a bingo game operator selects by chance, either manually or mechanically, from a receptacle that contains seventy-five objects at the beginning of each game, each object marked by a different combination of a letter and a number that corresponds to one of the seventy-five possible combinations of a letter and a number that can appear on the bingo cards;

(d) The winner of the bingo game includes any participant who properly announces during the interval between the announcements of letters and numbers as described in division (S) (I) (c) of this section, that a predetermined and preannounced pattern of spaces has been covered on a bingo card being used by the participant.

(2) Any scheme or game other than a game as defined in division (S) (I) of this section with the following characteristics:

(a) The participants use cards, sheets, or other devices that are divided into spaces arranged in horizontal,

vertical, or diagonal rows of spaces, with each space, except free spaces, being designated by a single letter, number, or symbol; by a combination of letters, numbers, or symbols; by a combination of a letter and a number, a letter and a symbol, or a number and a symbol; or by any combination of letters, numbers, and symbols, with some or none of the spaces being designated as a free, complimentary, or similar space;

(b) The participants cover the spaces on the cards, sheets, or devices that correspond to letters, numbers, symbols, or combinations of such that are announced by a bingo game operator or otherwise transmitted to the participants;

(c) A bingo game operator announces, or otherwise transmits to the participants, letters, numbers, symbols, or any combination of such as set forth in division (S) (2) (a) of this section that appear on objects that a bingo game operator selects by chance that correspond to one of the possible letters, numbers, symbols, or combinations of such that can appear on the bingo cards, sheets, or devices;

(d) The winner of the bingo game is any participant who properly announces that a predetermined and preannounced pattern of spaces has been covered on a card, sheet, or device being used by the participant.

(T) "Conduct" means to back, promote, organize, manage, carry on, or prepare for the operation of a scheme or game of chance but does not include any act performed by a bingo game operator.

(U) "Bingo game operator" means any person, except security personnel, who performs work or labor at the site of a bingo game including, but not limited to, collecting money from participants, handing out bingo cards or objects to cover spaces on the bingo cards, selecting from a receptacle the objects that contain the combination of letters and numbers that appear on the

bingo cards, calling out the combinations of letters and numbers, distributing prizes to the winner of the bingo game, and preparing, selling, and serving food or beverages.

(V) "Participant" means any person who plays bingo by covering the spaces on a bingo card that correspond to combinations of letters and numbers that are announced by a bingo game operator.

(W) "Bingo session" means a period, not to exceed five continuous hours, during which a person conducts one or more bingo games.

(X) "Gross receipts" means all money or assets, including admission fees, that a person receives from a bingo session that the person conducts without the deduction of any amounts for prizes paid out during the session or for the expenses of conducting the bingo session. "Gross receipts" does not include any money directly taken in from the sale of food or beverages by a charitable organization conducting a bingo session, or by a bona fide auxiliary unit or society of a charitable organization, at a bingo session conducted by the charitable organization, provided all of the following apply:

(1) The auxiliary unit or society has been in existence as a bona fide auxiliary unit or society of the charitable organization for at least two years prior to the bingo session;

(2) The person who purchases the food or beverage receives nothing of value except the food or beverage and items customarily received with the purchase of that food or beverage;

(3) The food and beverages are sold at customary and reasonable prices;

(4) No person preparing, selling, or serving the food or beverages at the site of the bingo game receives directly or indirectly any form of compensation for the prepara-

tion, sale, or service of the food or beverages.

(Y) "Security personnel" includes any person who either is a sheriff, deputy sheriff, marshal, deputy marshal, township constable, or member of an organized police department of a municipal corporation or has successfully completed a peace officer's training course pursuant to sections 109.71 to 109. 79 of the Revised Code and who is hired to provide security for the premises on which a bingo game is conducted.

(Z) "To use gross receipts for a charitable purpose" means that the proceeds of the bingo game are used by, or given, donated, or otherwise transferred to, any organization that is described in subsection 509 (a) (1), 509 (a) (2), or 509 (a) (3) of the Internal Revenue Code and is either a governmental unit or an organization that is tax exempt under subsection 501 (a) and described in subsection 501 (c) (3) of the Internal Revenue Code; that the proceeds of the bingo game are used by, or given, donated, or otherwise transferred to a veteran's organization, as defined in division (K) of this section, that is a post, chapter, or organization of war veterans, or an auxiliary unit or society of, or a trust or foundation for, any such post, chapter, or organization organized in the United States or any of its possessions, at least seventy-five per cent of the members of which are war veterans and substantially all of the other members of which are individuals who are veterans (but not war veterans) or are cadets, or are spouses, widows or widowers of war veterans, or such individuals, provided that no part of the net earnings of such post or organization inures to the benefit of any private shareholder or individual, and further provided that the bingo game proceeds are used by the post or organization for the charitable purposes set forth in division (B) (12) of section 5739.02 of the Revised Code, are used for awarding scholarships to or for attendance at an institution men-

tioned in division (B) (12) of section 5739.02 of the Revised Code, are donated to a governmental agency, or are used for nonprofit youth activities, the purchase of United States or Ohio flags that are donated to schools, youth groups, or other bona fide nonprofit organizations, promotion of patriotism, or disaster relief; that the proceeds of the bingo game are used by, or given, donated, or otherwise transferred to a fraternal organization that has been in continuous existence in this state for fifteen years for use exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals and contributions for such use would qualify as a deductible charitable contribution under subsection 170 of the Internal Revenue Code; or that the proceeds of the bingo game are used by a volunteer firemen's organization and are used by the organization for the purposes set forth in division (L) of this section.

(AA) "Internal Revenue Code" means the "Internal Revenue Code of 1954," 68A Stat. 3, 26 U.S.C. I, as now or hereafter amended.

(BB) "Youth athletic organization" means any organization, not organized for profit, that is organized and operated exclusively to provide financial support to, or to operate, athletic activities for persons who are eighteen years of age or younger by means of sponsoring, organizing, operating, or contributing to the support of an athletic team, club, league, or association.

(CC) "Youth athletic park organization" means any organization, not organized for profit, that owns, operates, and maintains playing fields that are used at least one hundred days per year for athletic activities by youth organizations as defined in division (BB) of section 2915.01 of the Revised Code and are not used for any profit-making activity at any time during the year, and which uses the proceeds of a bingo game exclusively

for the operation, maintenance, and improvement of such playing fields.

**§ 2915.02 Gambling.**

(A) No person shall:

(1) Engage in bookmaking, or knowingly engage in conduct that facilitates bookmaking;

(2) Establish, promote, or operate, or knowingly engage in conduct that facilitates any scheme or game of chance conducted for profit;

(3) Knowingly procure, transmit, exchange, or engage in conduct that facilitates the procurement, transmission, or exchange of, information for use in establishing odds or determining winners in connection with bookmaking or with any scheme or game of chance conducted for profit;

(4) Engage in betting or in playing any scheme or game of chance, except a charitable bingo game, as a substantial source of income or livelihood;

(5) With purpose to violate division (A) (1), (2), (3), or (4) of this section, acquire, possess, control, or operate any gambling device.

(B) For purposes of division (A) (1) of this section, a person facilitates bookmaking if he in any way knowingly aids an illegal bookmaking operation, including without limitation placing a bet with a person engaged in or facilitating illegal bookmaking. For purposes of division (A) (2) of this section, a person facilitates a scheme or game of chance conducted for profit if he in any way knowingly aids in the conduct or operation of any such scheme or game, including without limitation playing any such scheme or game.

(C) This section does not prohibit conduct in connection with gambling expressly permitted by law.

(D) This section does not apply to:

(1) Schemes of chance conducted by a charitable organization that is, and has received from the internal

revenue service a determination letter that is currently in effect, stating that the organization is, exempt from federal income taxation under subsection 501 (a) and described in subsection 501 (c) (3) of the internal revenue code, provided that all of the money or assets received from such scheme of chance after deduction only of prizes paid out during the conduct of the scheme of chance are used by, or given, donated, or otherwise transferred to, any organization that is described in subsection 509 (a) (1), 509 (a) (2), or 509 (a) (3) of the Internal Revenue Code and is either a governmental unit or an organization that is tax exempt under subsection 501 (a) and described in subsection 501 (c) (3) of the Internal Revenue Code, and provided that the scheme of chance is not conducted during, or within ten hours of, a bingo game conducted for amusement purposes only pursuant to section 2915.12 of the Revised Code;

(2) Games of chance, if all of the following apply:

(a) The games of chance are not craps for money, roulette for money, or slot machines;

(b) The games are conducted by a charitable organization that is, and has received from the internal revenue service a determination letter that is currently in effect, stating that the organization is, exempt from federal income taxation under subsection 501 (a) and described in subsection 501 (c) (3) of the Internal Revenue Code;

(c) The games are conducted at festivals of the organization that are conducted for a period of four consecutive days or less and not more than twice a year, and are conducted on premises owned by the charitable organization for a period of no less than one year immediately preceding the conducting of the games or on premises leased from a governmental unit;

(d) All of the money or assets received from these games of chance after deduction only of prizes paid out

during the conduct of the games of chance are used by, or given. donated, or otherwise transferred to, any organization that is described in subsection 509 (a) (1), 509 (a) (2), or 509 (a) (3) of the Internal Revenue Code and is either a governmental unit or an organization that is tax exempt under subsection 501 (a) and described in subsection 501 (c) (3) of the Internal Revenue Code;

(e) The games are not conducted during, or within ten hours of, a bingo game conducted for amusement only pursuant to section 2915.12 of the Revised Code.
No person shall receive any commission, wage, salary, reward, tip, donation, gratuity, or other form of compensation, directly or indirectly, for operating or assisting in the operation of any scheme or game of chance.

(3) Any fishing tournament operated under a permit issued under section 1533.92 of the Revised Code, as "fishing tournament" is defined in section 1531.01 of the Revised Code.

(E) Division (D) of this section shall not be construed to authorize the sale, lease, or other temporary or permanent transfer of the right to conduct schemes of chance or games of chance, as granted by division (D) of this section, by any charitable organization that is granted that right.

(F) Whoever violates this section is guilty of gambling, a misdemeanor of the first degree. If the offender has previously been convicted of any gambling offense, gambling is a felony of the fourth degree.

Supreme Court, U.S.
FILED
MAY 31 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1777

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

JESSE POSEY, SR., ET AL.,
*Petitioners,*

v.

STATE OF OHIO,
*Respondent.*

## ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

## RESPONDENT'S BRIEF IN OPPOSITION

CITY OF COLUMBUS
DEPARTMENT OF LAW

RONALD J. O'BRIEN
CITY ATTORNEY
90 West Broad Street, Room 200
Columbus, Ohio 43215
614/645-7385
COUNSEL OF RECORD FOR RESPONDENT

MARIA JUSKIW ARMSTRONG
ASSISTANT CITY PROSECUTOR
375 South High Street, 7th Floor
Columbus Ohio 43215
614/645-7483
OF COUNSEL

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., P.O. Box 856 • Grove City, Ohio 43123

## QUESTIONS PRESENTED

1. IS THE FOURTH AMENDMENT VIOLATED WHEN AN UNDERCOVER POLICE OFFICER ENTERS A SOCIAL CLUB AS THE GUEST OF A MEMBER AND OBSERVES CRIMINAL ACTIVITY WHICH FORMS THE BASIS FOR A GAMBLING CHARGE UNDER STATE LAW?

2. WHERE DIFFERENT SUBCLASSES OF CHARITABLE ORGANIZATIONS ARE DISTINGUISHED BY THE INTERNAL REVENUE CODE ON THE BASIS OF THE INUREMENT OF MONETARY BENEFITS, AND A STATE STATUTE CRIMINALIZES GAMBLING ACTIVITY BY THOSE GROUPS ON THE EXACT SAME BASIS, IS THE EQUAL PROTECTION CLAUSE VIOLATED?

## LIST OF PARTIES

The Petitioner in this matter is the Fraternal Order of Eagles Post 3261, and two employees of the Eagles Post: Jesse Posey, Sr. and Sharon Parker.

The State of Ohio is the Respondent.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented | i |
| List of Parties | ii |
| Table of Authorities | iv |
| Constitutional and Statutory Provisions Involved | vi |
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Constitutional and Statutory Provisions Involved | 3 |
| Statement of Facts | 4 |
| Argument | 6 |
| Conclusion | 17 |
| Certificate of Service | 18 |
| Appendix | A-1 |

## TABLE OF AUTHORITIES

Page

### CASES:


Commonwealth v. Ginter, 423 A.2d 1024 (Pa., 1981) . . . . . 10

Guidry v. State, 671 P.2d 1277 (Alaska, 1983). . . . . 10

Kadrmas v. Dikinson Pub. Schools, 487 U.S. (1988), 534 N.E.2d 61 & 65, 40 Ohio St. 3d at 425 . . . . . 11

Lewis v. United States, 385 U.S. 206 (1966). . . . . .7, 8

Maynard v. State, 508 N.E.2d 1346 (Ind., 1987) . . . . . 10

Mills-Jennings, Inc. v. Dept. of Liquor Control (1982), 435 N.E.2d 407, 70 Ohio St. 2d 95. . . . . 12

People v. Catania, 366 N.W.2d 38 (Mich. App., 1985) . . . . . 10

Ponce v. Green. 409 F.2d 621 (C.A. 9, 1969), cert. denied, 397 U.S. 1012 . . . . . 9

State v. Ahart, 324 N.W.2d 317 (Iowa, 1982). . . . . 10

State v. Anglada, 365 A.2d 720 (N.J., 1976). . . . . 10

State v. Buchwald, 196 N.W.2d 445 (Minn., 1972). . . . . 10

State v. Carey, 417 A.2d 979 (Maine, 1980) . . . . . 10

State v. McCleary, 308 S.E.2d 883 (N.C., 1983), aff'd, 316 S.E.2d 87 (N.C., 1984). . . . . 15

State v. McCommas, 398 So. 2d 1100 (La., 1981). . . . . 10

State v. Nedergard, 753 P.2d 526 (Wash. App. 1988) . . . . . 10

State v. Poland, 645 P.2d 784 (Ariz., 1982) . . . . . 10

State v. Wyand, 501 A.2d 43 (Md., 1985) . . . . . 15

United States v. Baldwin, 621 F.2d 251 (C.A. 6, 1980), cert. denied, 450 U.S.1043 . . . . . 8

United States v. Goldstein, 611 F. Supp. 624 (N.D. Ill. 1985) ..... 9

United States v. Lyons, 706 F.2d 321 (C.A.D.C., 1983) ..... 9

United States v. Miglietta, 507 F. Supp. 353 (MD Fla. 1980) ..... 8

United States v. Novello, 519 F.2d 1078 (C.A. 5, 1975), cert. denied, 423 U.S. 1060 ..... 9

United States v. Osorio de Santiago, 626 F. Supp. (D.P.R. 1986), aff'd 828 F.2d 866 (C.A. 1, 1987) ..... 9

United States v. Scherer, 673 F.2d 176, 182 (C.A. 7, 1982), cert. denied, 457 U.S. 1120 ..... 9

United States v. Schuster, 684 F.2d 744 (C.A. 11, 1982), cert. denied, 465 U.S. 1010 ..... 9

United States v. Shigemura, 682 F.2d 699 (C.A. 8, 1982), cert. denied, 459 U.S. 1111 ..... 9

United States v. Wright (C.A. 8, 1981), 641 F.2d 602, 605 ..... 9

## CONSTITUTIONAL PROVISIONS

Page

Ohio Const. sec. 6, art. XV ..... 12

## FEDERAL STATUTES

18 U.S.C. 1511 ..... 14

18 U.S.C. 1955(e) ..... 14

I.R.C. Sec. 501(c)(3) ..... 4, 13, 14, 16

I.R.C. Sec. 501(c)(8) ..... 4, 14

Pub. L. 91-452, Title VIII, Sec. 803(a)
10-15-70 Stat. 937 ..... 15

## OHIO STATUTES

O.R.C. 2915.01 ..... 13, 14

O.R.C. 2915.02 ..... 4, 13, 14, 15, 16

## OTHER AUTHORITIES

3 W. LaFave, Search and Seizure Sec.
8.2(m) (2d ed. 1987) ..... 6

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

---

JESSE POSEY, et al., Petitioners,

v.

STATE OF OHIO, Respondent

---

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

---

BRIEF IN OPPOSITION

---

## OPINIONS BELOW

The opinions of the courts below are adequately set forth in the petition.

## JURISDICTION

Respondent agrees with the initial statements concerning this Court's jurisdiction over this matter. However, as Petitioner points out in the last paragraph of the Jurisdictional section, the petition is filed well beyond the sixty day period set forth in United States Supreme Court Rule 20.1.

The instant case was argued and submitted to the Ohio Supreme Court on September 21, 1988, and decided on December 30, 1988. Because of the retirement of one Justice, the decision was not released and journalized until January 30, 1989, when the sixty-day period began to run. The petition for writ of certiorari should have been filed on or before March 31, 1989.

Petitioner argues that the amendments to 28 U.S.C. 1257 were discovered beyond the sixty day period. Respondent notes that the amended 28 U.S.C. 1257 became law on June 27, 1988 with an effective date of September 25, 1988, over four months before the journalization of the instant matter by the Ohio Supreme Court. The ninety-day delay before the effective date, as well as the four subsequent months, was ample time for Petitioner to have discovered the amendments.

The March 31, 1989 deadline having long since expired, and no extension having been granted by this Court, it would appear that Petitioner's application for writ of certiorari is submitted out of rule. Respondent respectfully urges this Court to deny the petition, if for no other reason than for its untimely filing.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents rely upon the following constitutional and statutory provisions:

United States Constitution, Fourth Amendment, Fourteenth Amendment

Ohio Constitution, Section 6, Article XV

18 U.S.C. 1511

18 U.S.C. 1955

I.R.C. Sec. 501(a)

I.R.C. Sec. 501(c)(3)

I.R.C. Sec. 501(c)(8)

I.R.C. Sec. 501(d)(2)(3)

P.L. 91-452, Title VIII, Sec. 803(a) 10-15-70 Stat. 937

Ohio Revised Code Sec. 2915.01 et seq.

## STATEMENT OF FACTS

On May 7, 1986, Detective Ernest Cook, an undercover Deputy of the Franklin County, Ohio Sheriff's Office, approached Appellants' establishment, the Fraternal Order of Eagles Post 3261, accompanied by an authorized member of the Eagles Lodge. The Eagles Lodge is a non-profit fraternal organization granted tax-exempt status under Section 501(c)(8) of the Internal Revenue Code. The Internal Revenue Code defines Sec. 501(c)(8) clubs as fraternal organizations which operate for the exclusive benefit of the individual members.

The Eagles member, who had previously informed the undercover detective that she believed illegal gambling regularly occurred at the Club, knocked on the door to the Eagles Lodge. The door was immediately opened and the member and her guest were advised that they may enter the premises. Although the member exhibited her membership identification, the record indicates that the doorkeeper did not look at her identification. Neither the informant nor her guest were questioned in any manner. The doorkeeper simply opened the door and invited the two to enter.

Upon entering the Club, Detective Cook plainly observed evidence of gambling activity. A search warrant was obtained based on the Detective's observations and three citations for violations of Ohio Revised Code Sec. 2915.02 were subsequently issued to Petitioners.

The above-mentioned Ohio Revised Code Section criminalizes the type of gambling witnessed by Detective Cook when conducted by any individual or group other than a charitable organization defined by I.R.C. 501(c)(3). The I.R.C. defines a 501(c)(3) organization as one in which no part of the net earnings inures to the benefit of any individual. The Ohio Revised Code Chapter which criminalizes gambling defines the illegal activity as that

which is designed to produce income for the individual.

Petitioner accurately summarizes the various court proceedings giving rise to the instant matter.

## ARGUMENT

### I.
### A FOURTH AMENDMENT VIOLATION DOES NOT OCCUR WHEN AN UNDERCOVER POLICE OFFICER ENTERS A SOCIAL CLUB AS THE GUEST OF A MEMBER AND OBSERVES CRIMINAL ACTIVITY WHICH FORMS THE BASIS FOR A GAMBLING CHARGE UNDER STATE LAW.

#### A. The Ohio Supreme Court correctly concluded that an undercover officer's failure to identify himself does not undermine consent to entry.

The court below correctly determined that "consent does not lose its status of being freely and voluntarily given merely because it would not have been given but for the fact that the other person failed to identify himself as a police officer or agent." 534 N.E.2d 61, 40 Ohio St. 3d 420, syllabus. The Ohio court based its decision on a series of cases issued by this Court. See pages A-13 through A-15 of the Petition. The same series of cases is examined and this Court's position summarized in 3 W. LaFave, *Search and Seizure* Sec. 8.2(m) (2d ed. 1987). At page 223 of the LaFave treatise, a conclusion identical to the lower court's holding is reached:

> when an individual gives consent to another to intrude into an area or activity otherwise protected by the Fourth Amendment, aware that he will thereby reveal to this other person either criminal conduct or evidence of such conduct, the consent is not vitiated merely because it would not have been given but for the nondisclosure or affirmative misrepresentation which made the consenting party unaware of the

> other person's identity as a police officer or police agent.

Of the cases relied upon by the court below, *Lewis v. United States*, 385 U.S. 206 (1966), is the most critical to the analysis of this fact pattern. The court below correctly recognized that the *Lewis* case is directly on point and dispositive. Petitioner argues that the facts presented in the instant matter differ significantly from the *Lewis* case. In *Lewis*, the defendant invited an undercover federal narcotics agent into his home, believing the agent was only an interested drug purchaser. This Court determined that

> a government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant.

In the case at bar, Petitioner invited the undercover detective into the Lodge, believing he was a social guest intending to enjoy the activities available. Once in the Club, the officer acted precisely as contemplated by the Lodge. The Ohio Supreme Court, following this Court's reasoning in *Lewis*, held that no violation of the Fourth Amendment occurred.

As the court below realized, the facts presented in *Lewis* are identical to the facts of this case in every relevant aspect. This Court's determination in *Lewis* was properly applied by the Ohio Supreme Court. Moreover, as stated below, the lower court's decision is also supported by numerous decisions of other state and federal courts. The court below correctly decided this issue, and its determination need not be reviewed by this Court. Respondent respectfully urges this Court to deny the Petition.

B. The Opinion of the Ohio Supreme court is not in conflict with the decision of any state or federal court and no substantial federal constitutional question is presented.

Petitioner asserts that "there is a divergence of opinion in both federal and state courts where government officials gain entry onto private property by deception as to the agents' identity or purpose." Petition p. 7. In framing the analysis as stated above, Petitioner fails to make a distinction which the courts, both state and federal, consistently make in ruling on the validity of a warrantless consent search. There is a distinct difference between a consensual entry acquired by a deception as to one's identity and an entry obtained by deception as to one's purpose.

The cases presented by Petitioner in support of his argument are cases involving deception of both purpose and identity. The instant matter presents no issue of deception as to purpose. The undercover deputy in this case was invited into the Club to participate in all of its activities, including gambling. Once inside, his activity conformed precisely with that expected and allowed by Petitioner.

When presented with fact patterns which parallel those presented here, numerous courts have found no Fourth Amendment violation. Respondent is unable to find a single case decided since this Court's pronouncement of *Lewis* supra, in which any court found that deception as to identity alone invalidated the consent given. Federal and state courts unanimously and correctly apply *Lewis*, supra, to find no constitutional violation.

In addition to *United States v. Baldwin*, 621 F.2d 251 (C.A. 6, 1980), cert. denied, 450 U.S. 1043, and *United States v. Miglietta*, 507 F. Supp. 353 (MD Fla. 1980), which are cases cited by Petitioner, and *United States v.*

*Goldstein*, 611 F. Supp. 624 (N.D. I11. 1985), and *United States v. Osorio de Santiago*, 626 F. Supp. 329 (D.P.R. 1986), aff'd 828 F.2d 866 (C.A. 1, 1987), cases highlighted by the court below, the Fifth, Seventh, Eighth, Ninth, Eleventh, and District of Columbia circuits[1] have ruled on the issue presented in this case. In *United States v. Scherer*, 673 F.2d 176, 182 (C.A. 7, 1982), cert. denied, 457 U.S. 1120, the Court concluded:

> A government agent may obtain an invitation onto property by misrepresenting his identity, and if invited, does not need probable cause nor warrant to enter so long as he does not exceed the scope of his invitation..

In *United States v. Wright* (C.A. 8, 1981), 641 F.2d 602, 605, the Eighth Circuit upheld the search by undercover officers and held that consent was knowingly and intelligently given even though the defendant was unaware of the officers' identity. The court noted:

> The undercover officers did not engage in any conduct inconsistent with that expected or contemplated by appellant when he opened the door.

The various state courts which have decided cases involving an undercover officer's misrepresentation of identity are also unanimous in their conclusion that an undercover officer's misrepresentation of identity alone is

[1] *United States v. Novello*, 519 F.2d 1078 (C.A. 5, 1975), cert. denied, 423 U.S. 1060; *Ponce v. Green*, 409 F.2d 621 (C.A. 9, 1969), cert. denied, 397 U.S. 1012; *United States v. Schuster*, 684 F.2d 744 (C.A. 11, 1982), cert. denied, 465 U.S. 1010; *United States v. Shigemura*, 682 F.2d 699 (C.A. 8, 1982), cert. denied, 459 U.S. 1111; and *United States v. Lyons*, 706 F.2d 321 (C.A.D.C., 1983).

constitutional. The State of Washington provides a long series of cases upholding "ruse entries" by police officers. In the most recent case, a police officer gained entry by posing as an interested home buyer who, when looking through the home as an interested buyer would, observed evidence of criminal activity. *State v. Nedergard*, 753 P.2d 526 (Wash. App. 1988). The court upheld the entry as consensual and found no Fourth Amendment violation.[2]

In *Commonwealth v. Ginter*, 423 A.2d 1024 (Pa., 1981), the Pennsylvania court was faced with a fact pattern virtually identical to the case at bar. In Ginter, an undercover liquor agent, posing as the guest of a member-informant, entered a private social club and observed the illegal sale of liquor. The Pennsylvania court upheld the search, and found it consensual based upon the *Lewis* case.[3]

When dealing with ruse entries, some states have articulated an additional requirement that the officer show some justification to support the entry. Three states which require the officer to articulate some reasonable belief that criminal activity is occurring are Iowa, *State v. Ahart*, 324 N.W.2d 317 (1982); Michigan, *People v. Catania*, 366 N.W.2d 380 (1985); and Minnesota, *State v. Buchwald*, 196 N.W.2d 445 (1972).

Although the court below did not articulate such a requirement, it did note that the undercover detective had

---

[2]Other states which have upheld the entrance of a police officer posing as a home buyer include Alaska, *Guidry v. State*, 671 P.2d 1277 (1983); Arizona, *State v. Poland*, 645 P.2d 784 (1982); and New Jersey, *State v. Anglada*, 365 A.2d 720 (1976).

[3]Other states upholding consensual entry where the officer uses deception as to identity, which does not exceed the scope of the consent, include Indiana, *Maynard v. State*, 508 N.E.2d 1346 (1987); Louisiana, *State v. McCommas*, 398 So. 2d 1100 (1981); and Maine, *State v. Carey*, 417 A.2d 979 (1980).

information from the member that some type of gambling activity was occurring at the Eagles Lodge. Under the analysis applied by the courts of Iowa, Michigan, and Minnesota, such information, although perhaps not specific enough to support the issuance of a search warrant, would provide justification for the deceptive entry.

All of the cases cited above parallel the reasoning of the court below. There is no conflict among the various courts as to this issue and no need for this Court to grant certiorari to secure harmony of decisions.

## II

## AN EQUAL PROTECTION VIOLATION DOES NOT OCCUR WHEN A STATE LEGISLATURE CHOOSES TO CRIMINALIZE GAMBLING ACTIVITY BY CERTAIN SUBCLASSES OF CHARITABLE ORGANIZATIONS AND BASES THE PROHIBITIONS ON RATIONAL DISTINCTIONS FOUND IN THE INTERNAL REVENUE CODE.

The Ohio Supreme Court set forth the following test for equal protection analysis based upon this Court's opinion in *Kadrmas v. Dikinson Pub. Schools*, 487 U.S.___ (1988):

> With regard to the application of R.C. 2915.02 to appellant FOE, no suspect classification is made and no fundamental right is curtailed. Accordingly, as with most social and economic legislation, we will uphold the classifications drawn by the statute if they are rationally related to a legitimate state interest.
>
> 534 N.E.2d 61 & 65, 40 Ohio St. 3d at 425.

In the instant matter, as the court below found, the relationship between the state interest of prohibiting individual monetary gain through gambling is rationally related to the criminalization of gambling by groups whose income directly inures to the benefit of individual mem-

bers. More specifically, the exemption of organizations legally defined as providing no monetary benefit to individual members is not contrary to the governmental objective.

In the State of Ohio, the governmental interest in regulating gambling activity is very strong and well established. At the outset, it should be noted that the Ohio Constitution specifically prohibits gambling activity except as permitted by the Legislature. Section 6, Article XV, provides that "lotteries, and the sale of lottery tickets, for any purpose whatever shall forever be prohibited in this State."

In *Mills-Jennings, Inc. v. Dept. of Liquor Control* (1982), 435 N.E.2d 407, 70 Ohio St. 2d 95, the Ohio Supreme Court interpreted the above-reference section, and emphasized Ohio's strong public policy against gambling. More importantly, the lower court noted that the gambling statutes "when being interpreted and enforced, should not go beyond *the specific provisions* of the [Ohio] Criminal Code as revised in 1974 and as subsequently amended." *Mills-Jennings, supra* at 101 (emphasis added).

The well-established public policy and pronouncements of the Ohio Supreme Court indicate that, while the legislature may have relaxed the prohibitions against gambling over the years, the legislative intention must be strictly followed.

The state interest in prohibiting gambling is defined by the Ohio Legislature in the published committee comments to the House Bill amending Ohio's gambling laws. (Appendix A-1.) That comment provides, in pertinent part:

> The fundamental thrust of new Chapter 2915 is to prohibit the business of gambling without forbidding gambling carried on for pleasure rather than profit.

> Under the chapter, all forms of gambling and activities in aid of it are illegal if carried on as a business, or for personal profit, or as a significant source of income or livelihood.

O.R.C. 2915.01(E), set forth by Petitioner at page A-35, also evidences the legislative purpose. That section defines a game of chance conducted for profit as one designed to produce income for the individual person. By prohibiting games of chance as defined above, the state objective of curbing individual gain through gambling is met.

O.R.C. 2915.02(D) sets forth narrowly defined exemptions form prosecution for gambling. In subsection (2)(b) of the above referenced statute, the legislature has determined that a charitable organization may gamble only if it is:

> exempt from federal income taxation under subsection 501(a) *and described in subsection 501(c)(3) of the Internal Revenue Code;*
>
> R.C. 2915.02(D)(2)(b), emphasis added.

R.C. 2915.02(D) clearly manifests the Ohio Legislature's intention to prohibit 501(c)(8) organizations, such as Petitioner's, from gambling. This intention is further evidenced by the Ohio General Assembly's repeated refusal to amend R.C. 2915.02(D). during the 1987-1988 session, the state legislature failed to pass four separate bills proposing amendments to this subsection.

Petitioner's argument that the narrowly tailored exemption for 501(c)(3) organizations contradicts the stated governmental interest, is meritless. The Internal Revenue Code definitions of charitable organizations, upon which the Ohio gambling statute is founded, reveal that the objective of prohibiting personal benefit is direct-

ly paralleled in the tax code.

The inurement of benefits is the crucial distinction between 501(c)(3) organizations and other 501(c) organizations. 501(c)(8) defines a fraternal order as an organization which operates "for the exclusive benefit of the members of a fraternity itself." 501(c)(3) includes the following:

> *no* part of the net earnings of which inures to the benefit of any private shareholder or individual.

The purpose of Ohio's gambling statute reflects this distinction. R.C. 2915.02 prohibits the use of games of chance when benefit inures to any individual. By carving a narrow exception allowing 501(c)(3) organizations to gamble, the legislature did not destroy this purpose or undermine the strong public policy reasons for curtailing gambling activity.

A review of federal gambling laws also supports Respondent's argument. The federal gambling law, like our state law, limits the exemption to 501(c)(3) organizations. Like R.C. 2915.01(E), 18 U.S.C. 1955(e) defines illegal gambling as activity which benefits, or produces income for, the individual.

18 U.S.C. Section 1955(e) provides the following exemption for charitable organizations:[4]

> (e) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross receipts derived from such activity inures to the

[4]18 U.S.C. 1511, which makes it illegal for a government official to conspire to obstruct state or local gambling laws, contains the identical exemption.

> benefits of any private shareholder, member, or employee of such organization except as compensation for actual expenses incurred by him in the conduct of such activity.

The legislative history to Pub. L. 91-452, Title VIII, Sec. 803(a), 10-15-70, Stat. which amended 18 U.S.C. Section 1955, explained:

> Section 1955(e) excluded from the operation of the section games of chance conducted by tax exempt organizations where no part of the gross receipts inures to the benefit of an individual.

Finally, case law supports the lower court's conclusion that the exemption of 501(c)(3) organizations from R.C. 2915.02 proscriptions does not violate the equal protection clause. To the best of Respondent's knowledge, only two courts have dealt specifically with this topic.

Besides the Ohio court in the case at issue, courts for the states of North Carolina and Maryland have found a rational nexus and rejected the equal protection claim. See *State v. McCleary*, 308 S.E.2d 883 (N.C., 1983) aff'd 316 S.E.2d 87 (1984), and *State v. Wyand*, 501 A.2d 43 (Md., 1985).

Petitioner argues that the Ohio laws regulating bingo, and the laws of other states undermine the rationality of the nexus between Ohio's gambling law exemptions and the governmental interest. In reply, Respondent would merely point out that other Ohio laws and the laws of other states cannot impact upon an equal protection analysis of R.C. 2915.02.

These laws are founded upon completely different state interests, the creation of which lies strictly within the province of the various state legislatures.

The Ohio Supreme Court correctly concluded that R.C.

2915.02 does not deny equal protection of the law by exempting 501(c)(3) organizations from prosecution. The legislature's decision to permit gambling only by those organizations in which no monetary benefit inures to the individual members, is rationally related to the state's interest in preventing individuals from earning income from gambling. Respondent respectfully urges this Court to deny Petitioner's application for writ of certiorari.

## CONCLUSION

For the reasons set forth above, Respondents respectfully urge this Court to deny the petition for writ of certiorari.

Respectfully submitted,

CITY OF COLUMBUS
DEPARTMENT OF LAW

RONALD J. O'BRIEN
CITY ATTORNEY
90 West Broad Street, Room 200
Columbus, Ohio 43215
614/645-7385
COUNSEL OF RECORD FOR
RESPONDENT

MARIA JUSKIW ARMSTRONG
ASSISTANT CITY PROSECUTOR
375 S. High Street, 7th Floor
Columbus, Ohio 43215
614/645-7483
OF COUNSEL

## CERTIFICATE OF SERVICE

I, Ronald J. O'Brien, being a member of the Bar of this Court, hereby certify that three copies of this Brief in Opposition were mailed, first class postage prepaid, on May 31, 1989, to John A. Connor II, 218 East State Street, Columbus, Ohio 43215. I further certify that all parties required to be served have been served.

RONALD J. O'BRIEN
90 West Broad Street, Room 200
Columbus, Ohio 43215
COUNSEL OF RECORD FOR
RESPONDENT

# APPENDIX

Committee Comment to H 511

The fundamental thrust of new Chapter 2915. is to prohibit the business of gambling without forbidding gambling carried on for pleasure rather than profit.

Under the chapter, all forms of gambling and activities in aid of it are illegal if carried on as a business, or for personal profit, or as a significant source of income or livelihood. Otherwise, no form of gambling is illegal. Gambling in public is prohibited to avoid enforcement problems, and this represents a partial exception to the general rule in the chapter.

Cheating as such was not an offense under former law, but is an offense under Chapter 2915. regardless of whether the gambling activity in which it occurs is legal or illegal. For penalty purposes, cheaters are treated much the same as thieves under new section 2913.02 of the Revised Code. A simplified version of a former prohibition against "fixing" sporting events is also included in the chapter.